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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

MICHAEL P. OSHATZ,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented for Review

1. Whether petitioner's Sixth Amendment right to confront his accusers was violated by the trial court's rulings restricting cross-examination of the key prosecution witness by excluding critical defense exhibits and preventing a significant line of inquiry designed to show bias on his part because of his financial interest in cooperating with the government.

2. If the trial court's rulings restricting cross-examination of the key prosecution witness violated petitioner's Sixth Amendment right to confront his accuser, was such error harmless because, assuming the damaging potential of the cross-examination was fully realized, a reviewing court might nonetheless hold the error was harmless beyond a reasonable doubt.

3. Whether the trial court's decision to allow the prosecution to ask a character

witness a hypothetical question that assumed petitioner's guilt (and resulted in preventing petitioner from calling further character witnesses in order to avoid the government's repetition of this presumption of guilt), and the court of appeals' violation of its own "clear" rule against such cross-examination enunciated in United States v. Morgan, 54 F.2d 31 (2d Cir.) cert. denied, 434 U.S. 965 (1977), which the court avers in its decision in the case here on appeal "should have been followed in this case" (after observing that it shares "the view of all members of the Morgan panel that such cross-examination is nevertheless to be prohibited because it creates too great a risk of impairing the presumption of innocence"), violated the presumption of innocence.

4. Whether the admission of the Government's summary chart, which violated the decisions in United States v, Dioguardi, 428 F.2d 1033 (2d Cir.), cert. denied, 400 U.S. 825 (1970) and United States v. Citron, 783 F.2d 307 (2d Cir. 1986) and the standards of Fed. R. Evid. 1006, because the chart was not made available a reasonable time before trial, computer records were not delivered until well after the chart was put in evidence, an "audit trail" was not kept by the government and trial court did not independently determine that the chart was a fair representation and summary of the evidence, all of which improperly shifted the burden of proof to petitioner and caused an egregiously erroneous and highly inflammatory chart to sit before the jury for approximately ten days while it was being tested and corrected scores of times, along with a number of other evi-

dentiary and procedural rulings by the trial court, including the admission of unverified, unfairly prejudicial and irrelevant proof of uncharged acts and the refusal to permit any inquiry whatsoever concerning apparent jury improprieties, all of which the court of appeals found "harmless" (individually and in the aggregate), prevented petitioner from having a fair trial.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

January Term, 1991

Michael P. Oshatz,

Petitioner,

against

United States of America

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Parties to the Proceedings Below

Michael P. Oshatz* petitions this court for a writ of certiorari to review an order of the United States Court of Appeals for the Second Circuit, which affirmed a judg-

* Co-defendant Leonard A. Messinger, who was also convicted after the trial, is not a party to this petition.

ment of conviction entered in the United States District Court for the Southern District of New York (Hon. Robert W. Sweet), upon a prosecution brought by the government of the United States.

Jurisdiction

The decision and order of the Court of Appeals affirming judgment of conviction was entered on August 23, 1990 (Appendix A) and is reported under United States v. Oshatz, 912 F.2d 534 (2d Cir. I990). The order of the Court of Appeals denying the petition for rehearing was entered October 10, 1990 (Appendix B). An application for an extension of time within which to docket this case is being filed simultaneously herewith.

Jurisdiction is conferred on this Court by Supreme Court Rules, Rule 17.1(a).

Statutes and Rules Involved

U.S. Const. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor and to have the assistance of counsel for his defense.

Fed. R. Evid. 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

(a) Exclusion Mandatory. Although relevant, evidence is not admissible if its probative value is substantially out-weighed by the danger of unfair prejudice, or confusion of the issues, or misleading the jury.

(b) Exclusion Discretionary. Although relevant, evidence may be excluded if its probative value is substantially out-weighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 1006. Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. The originals or duplicates shall be made available for examination or copying, or both, by other parties at reasonable times and places. The court may order that they be produced in court.

Statement of the Case

A. Overview of the Indictment

The charges on which petitioner Oshatz was tried and convicted are contained in a 16-count indictment (Indictment 87 Cr. 1000) filed against him and co-defendant Leonard A. Messinger in the United States District Court for the Southern District of New York on December 28, 1987. Count One charges that from about April 1979 through about April 1983, petitioner and his co-defendant, along with unspecified others, conspired to

defraud the United States and the Internal Revenue Service and to violate provisions (26 U.S.C. §§ 7206(1) and 7206(2)) of the Internal Revenue Code, in violation of Title 18, United States Code, 371. The indictment alleges that appellants, who were tax attorneys practicing in New York, assisted in forming and representing a number of limited partnership tax shelters that engaged in prearranged and fraudulent trades in order to create tax deductions based on trading losses and interest expenses. Counts Two through Thirteen charge that in 1981 and 1982, due to his legal representation of certain partnerships, petitioner aided and assisted in the filing of false tax returns of such partnerships, in violation of Title 26, United States Code, Section 7206(2); Counts Two through Eight--which relate to returns filed in 1982--also name Messinger as a defendant. Counts Fourteen and

Fifteen charge petitioner alone with violating Title 26, United States Code, Section 7206(1), by making and subscribing to personal income tax returns which were false because they reflected trading losses allocated to him by several tax shelter investments. Count Sixteen, the remaining Count, charges Messinger with a similar offense.

Trial commenced on November 21, 1988, and, on February6, 1989, after merely 5-1/2 hours of deliberations, the jury returned guilty verdicts on all counts.

On May 18, 1989, petitioner filed a motion pursuant to Fed. R. Crim. P. 33, seeking either a new trial or further inquiry to determine whether, in light of certain post-trial revelations, the jury's hasty verdict was the product of any improper outside influence or premature deliberations. In an opinion dated June 15, 1989 (Appendix C), the court denied peti-

tioner's post-trial motion in all respects.

On July 14, 1989, Judge Sweet sentenced petitioner on Count One to a forty-month term of imprisonment; on Counts Two through Fifteen the Court suspended the imposition of sentence and placed petitioner on probation for a period of three years.

B. The Charges Against Petitioner Michael P. Oshatz

Petitioner was charged with one count of conspiracy, twelve counts of aiding and assisting in the filing of false tax returns and two counts of subscribing to and filing false personal income tax returns. Guilt with respect to the second through fifteenth counts depended on demonstrating that petitioner, the partner in his law firm responsible for the account, knew or should have known that one Edward A. Markowitz was effecting prearranged and fictitious trades to create losses that could be allocated to the limited partners of various limited partnerships for which he traded and controlled

and thus was part of the conspiracy led by Markowitz.

Markowitz, the self-confessed mastermind of this and other fraudulent schemes, testified at trial as the government's key witness, pursuant to a plea bargaining agreement he had struck with the government. Pursuant to his cooperation agreement, Markowitz was permitted to plead guilty to four felony charges. He received a sentence of probation only shortly after this trial.

Markowitz admitted he had effected hundreds of millions of dollars of fraudulent transactions having no connection to the petitioner. In fact, at least 85 percent of his fraudulent activities had no connection to petitioner. Petitioner did not dispute that Markowitz engaged in fraudulent trading; the contested issue was whether petitioner was aware of Markowitz's wrongful

activities.

Markowitz admitted at trial that (unbeknownst to petitioner) beginning in 1978 and throughout the period of time embraced in the indictment, he suffered from severe addiction to cocaine and alcohol. His consumption steadily increased over time; by the middle of 1982, he was ingesting about an ounce of cocaine (costing between $2,000 and $3,000) per week and a quart of liquor per day. In fact, in 1982 and 1983, Markowitz took cocaine just "to get out of bed in the morning...." Nevertheless, throughout his direct testimony at trial, Markowitz purported to recall the specifics of numerous conversations that had occurred seven to nine years earlier, while he was in the throes of his addiction. Indeed, he claimed a lack of recollection in response to fewer than 30 of the nearly 3,000 questions put to him on direct

testimony. His memory was not nearly so sharp on cross examination, however; in response to more than 900 of about 4,000 questions, he claimed a failure of recollection.

1. **The Conspiracy**

According to Markowitz, sometime in 1979 he met with petitioner and other attorneys from the New York law firm of Goldschmidt, Fredericks, Kurzman & Oshatz ("law firm")to discuss his interest in forming for syndication a limited partnership that would operate as a legitimate tax shelter. The law firm was to prepare the private placement memorandum and Markowitz was to establish the necessary trading relationships, hire employees, lease space and run the day-to-day op-erations of the enterprise.

The law firm prepared and had filed a Certificate of Limited Partnership and thus the Monetary Group Associates was

formed. The general partner was a recently formed corporation called the Monetary Group, Ltd. Mark Coler, who was also an attorney, worked with the law firm in all facets of the legal work. He became an officer and 50 percent owner of the corporation and, with Markowitz (the other 50 percent owner), was responsible for raising or causing to be raised the funds necessary to begin operation of the new business. Later in 1979, when it was clear that sufficient funds would be raised to implement the syndication, Markowitz moved his operations from New York City to Washington D.C., where he leased space, hired a number of employees, including his sister, and began operations.

Having raised, with the assistance of professional brokers, in excess of $1,000,000, Markowitz was obligated to provide the promised four-to-one write

off for the investors. Instead of effecting the necessary trades, Markowitz and his metals trader Tom Walsh wrote up the trades after the end of the year. By using back issues of the Wall Street Journal, they prepared trading tickets and confirmations purporting to reflect trades between the Monetary Group and a foreign corporation wholly owned by Markowitz and known only to Walsh.

The fictitious trades supposedly involved "straddle transactions" in gold. Prior to the enactment of the Economic Recovery Tax Act of 1981, tax straddles provided a legitimate method by which many investors sought to shelter income. Real tax straddles always involved some (albeit minimal) market risk.

During 1980, two groups of professional underwriters requested Markowitz to form several similar limited partnerships whose interests they could

sell to their customers. In early 1980, Markowitz asked the law firm to assist in the creation of The Treasury Group and Cambridge Financial Group. The law firm prepared the partnership documents, private placement memoranda and tax opinions. Markowitz and Coler undertook to form, house, staff and operate the businesses. The underwriters raised, in the aggregate, in excess of $9,000,000.

One Jay Barr was hired to be the chief trader for the two new partnerships. Using previously established relationships on Wall Street, Barr assisted Markowitz in implementing prearranged straddle trades in Treasury bills in order to achieve tax deductions. The trades were arranged mainly through Donaldson, Lufkin & Jenrette. Barr testified at trial that, at the time of the trades, arrangements of such nature were so commonplace that he and his counter-

part at the investment banking house (which maintained separate computer runs for these and other similar tax transactions) believed them to be legiti mate. He also testified that he barely knew who petitioner was and never dis- cussed trading with him.

In the middle of 1980, Markowitz requested the law firm to form amother limited partnership to be called TMGA II. With this vehicle, Markowitz brought in his old friend Donald Weil, a Chicago-based commodities trader, to act as his co-general partner, help handle the trading and raise money.

2. Aiding and Assisting in the Filing of False Income Tax Returns

With respect to 1979, Price Waterhouse & Company prepared and signed a certified financial statement and Partnership Information Return for the Monetary Group Associates. In connection

with the preparation of the 1980 information returns for the two Monetary Group partnerships, the accounting firm requested additional documentation of certain off-shore trades. Not satisfied with the information provided, the accounting firm prepared, but did not sign the return for the second partnership and did not prepare the return for the older partnership. As a result, the returns were finished and signed by the outside accountants for the partnerships. Apparently, Price Waterhouse did not have any reason to suspect fraud because the firm actively sought to continue its engagement as auditors for the two partnerships promoted by the professional underwriters and operated by Markowitz.

Meanwhile, in addition to obtaining tax losses for limited partnerships formed by it, The Monetary Group provided tax losses to a variety of individuals

and partnerships, including several partnerships that petitioner was a member of. Markowitz was both slow and sloppy in completing the necessary trading documents. In addition to the aforememtioned, Markowitz developed a relationship with a group of Texas promoters for whom he achieved in excess of 85 percent of the tax losses that he "traded for" over the years covered by the indictment. Petitioner had no connection with the Texas group.

In late 1981 and early 1982, approximately two dozen clients of The Monetary Group received audit notices from the Internal Revenue Service. Markowitz notified petitioner who agreed to allow the tax preparers to retain his law firm to handle the matter on behalf of the taxpayers. A member of the firm (the co-defendant) reviewed the transactions with Markowitz and then met with the rep-

representatives of the Internal Revenue Service whose position was that the taxpayers did not expect to earn a profit from the trades. After a series of negotiations, the Internal Revenue Service agreed that it would disallow the claimed loss deduction but would allow a deduction equal to the margin deposit that was placed with the Monetary Group. All penalties were waived and no fraud was alleged or found.

As the partner responsible for supervising the legal work performed by his law firm for the "Markowitz entities" and a partner in several Markowitz-managed "outside" partnerships, petitioner was found guilty of twelve counts of aiding and assisting in the preparation of false Partnership Information Returns.

3, <u>The Filing fo False Income Tax Returns</u>

Petitioner's 1980 and 1981 personal

income tax returns reflected deductions allocated to him by the Markowitz-managed outside partnerships of which he was a partner. Pursuant to Markowitz's testimony that by 1981 (the year that 1980 returns were filed) petitioner should have known that Markowitz was involved in fraudulent trading, petitioner was convicted not only of counts two through thirteen relating to the false partnership returns which allocated false deductions to the investors, but also of subscribing to and filing false 1980 and 1981 personal income tax returns.

C. Post-trial Proceedings

Trial commenced on November 21, 1988 and, on February 6, 1989, after merely 5 1/2 hours of deliberations, the jury returned guilty verdicts against each defendant on each of the counts in which he was named.

On May 18, 1989 Oshatz filed a motion

pursuant to Fed. R. Crim. P. 33, seeking either a new trial or further inquiry to determine whether, in light of certain post-trial revelations, the jury's hasty verdict was the product of any improper outside influence or premature deliberations. In an opinion dated June 15, 1989, the court denied petitioner's post-trial motion in all respects, even though Judge Sweet observed at oral argument that the defense proffer appeared to warrant further inquiry.

Two forms of jury misconduct occurred in this case. First, a juror who spoke with a defense expert advised him that after Markowitz had testified, "all the jurors' minds were made up and the jury believed the defendant's were guilty." The juror's volunteered statement unmistakably suggested that the jury improperly deliberated and reached a conclusion long before it heard all of

the proof, the summations and the court's instructions. This conclusion is buttressed by the remarkable brevity of the jury's deliberations. Courts have long recognized that premature discussions among jurors may violate the defendant's constitutional right to be tried by an "impartial jury." This jury even ignored the fact that the prosecution had "given up" on at least two counts in the indictment.

The defense also made a strong showing with respect to the presence of improper outside influence. Shortly prior to the deliberations which extended for an hour and one-half on Friday, February 3, 1989, juror Steven Lee requested that he be excused from deliberations on Monday, February 6, 1989, because it was Chinese New year "and I will have family obligation that will forbid me to be here that day." (Emphasis added.) Judge Sweet

denied Mr. Lee's request that he be excused and asked him to "cut down [his] commitments on Monday" so that he could deliberate "at least part of the day if not all of the day." Judge Sweet never provided any assurance that Mr. Lee would be permitted to honor his commitments to his family. Not surprisingly, the record reflects Mr. Lee's continuing concern about his conflicting obligations. Thus, at 11:40 a.m. on Chinese New Year, after little more than a total of four hours of deliberations, the jury sent a note to the court requesting permission to adjourn at 1:00 p.m. "to accommodate a prior commitment made by Mr. Lee ...." The court did not respond to the jury's request--leaving Mr. Lee and the other jurors to wonder what their schedule would be. Thereupon, at five minutes before 1:00 p.m., the jury suddenly reported that it had reached a verdict.

The district court erred in foreclosing the defense from investigating further either of these apparent jury improprieties and the court of appeals erred in ignoring the clear evidence of the violation of petitioner's Sixth Amendment right to trial by an impartial jury.

D. Summary of Arguments to the Court of Appeals

On appeal from his resulting judgment of conviction, petitioner argued that the trial court erred in: excluding critical defense exhibits and restricting cross-examination that would have undermined the credibility of the government's key witness and thus violating his rights under the Confrontation Clause; admitting unfairly prejudicial and irrelevant proof of undemonstrated and uncharged acts; permitting the government to confront petitioner's

character witness with hypothetical questions that assumed petitioner's guilt (see, United States v. Oshatz, 704 F. Supp. 511 (S.D.N.Y. 1989) (annexed as Appendix E); in admitting grossly inaccurate summary charts for which no proper foundation had been laid; and, refusing to permit any inquiry whatsoever concerning apparent jury improprieties.

Petitioner also maintains the combination of the trial court's erroneous rulings fatally flawed petitioner's conviction in a number of respects and deprived the petitioner of a fair trial.

E. The Court of Appeals' Decision

In an opinion supporting its affirmance of all charges, the court of appeals essentially condoned the govern-men trewriting the trial transcript to conform the trial court's rulings to the government's legal theories on appeal. For instance, the court of appeals ignored the indisputable record which in-

dicates that, as he thought he was bound, Judge Sweet did not exercise his discretion when he excluded certain critical documentary evidence and cross-examination designed to demonstrate the overwhelming financial reasons for the government's key witness to lie. It also ignored much of its own strong precedent (with respect to the admissibility of summary charts and other matters). Though warning the government not to breach the Morgan prohibitions (against hypothetical questions posed to character witnesses which assume the defendant's guilt) again, at the risk of incurring a reversal, the court of appeals determined that just for this time it would consider the government's violations and the trial court's erroneous rulings as "harmless". See, Appendix D (petition for re-hearing and suggestion for rehearing en banc before the court of appeals).

F. Petition for Rehearing and Suggestion for Rehearing En Bnc

In a timely petition for rehearing, (See, Appendix D) petitioner took strong issue with the court of appeals' misapprehension, if not gross distortion, of the trial record regarding Judge Sweet's failure to exercise discretion in erroneously excluding critical defense exhibits and cross-examination which would have clearly demonstrated to the jury that the government's key witness was strongly biased because of his enormous financial interest in pleasing the government. The trial court did not purport to exercise its discretion because it did not believe that it had any under Fed. R. Evid. 608.

The petition for rehearing also takes great umbrage with the fact that the government's defiance of the mandate in Morgan was countenanced by the court of

appeals. The court of appeals effectively held that they would let the government get away with flouting the rules of the court (as well as the Constitution of the United States) one more time and that the next time it would reverse. See, United States v. Long, No. 89-1227, slip op. (2d Cir. Oct.19 , 1990) reversing, in part, because of serious Morgan violations, and whose panel contained one of the members of the panel that heard the case at issue and also turned down the petition for rehearing.

Strong objection was also taken to the admission of the government's summary chart which clearly violated the Second Circuit Court of Appeals' own strong authority in its decisions in Dioguardi and Citron.

Finally, the panel completely ignored the cumulative effect of a number of erroneous rulings, including the strong

adverse impact of the admission of "proof" with respect to equivocal uncharged acts. The Petition for Rehearing and Suggestion for Rehearing En Banc was denied in an order entered on October 6, 1987. Appendix B.

Reasons for Allowance of the Writ

It is petitioner's contention that the writ petitioned for herein should be allowed based upon four separate areas where the the federal court of appeals has so far departed from the accepted course of judicial proceedings, and has also sanctioned such departures by the trial court, that the supervision of the United States Supreme Court is called for. Supreme Court Rules, Rule 17.1 (a)

A. Petitioner's Right of Confrontation was Severely Violated by the Trial Court's Misconception of the Application of Some of the Federal Rules of Evidence; the Trial Court's Erroneous

Rulings Were Not Harmless

The recent case of Harper v. Kelly, decided on October 10, 1990 in the Second Circuit Court of Appeals concisely sets forth that court's attitude, as based on the most recent pronouncements of the United States Supreme Court. The case sets forth that "The Sixth Amendment to the U.S. Constitution states: 'In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.'" (Quotes are in the original.) "Of all the rights covered by the Confrontation Clause, the right to cross-examine witnesses is perhaps the most important. In its earliest decision interpreting the Confrontation Clause, the Supreme Court wrote that cross-examination gives the accused an opportunity to 'test[] the recollection and sift[] the conscience of the witness ....' Mattox v. United States, 156 U.S.

237, 242 (1985). Twenty years ago, the court called cross-examination the 'greatest legal machine ever invented for the discovery of the truth.' Most recently, the court reiterated this point: 'The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.' Maryland v. Craig, ___ U.S. ___ , 110 S. Ct. 3157, 3163 (1990)."

While Harper related to the reliability of an "eye witness," the issues are very similar. That case entailed an effort to inquire into the status of a witness' mind during the occurrence of the crime. Here, petitioner's counsel tried to demonstrate Markowitz had secreted large amounts of his criminal proceeds, funneled huge sums to relatives, and struck a deal with the government

in the hope of minimizing the risk he would have to relinquish his hidden assets. Though he pled poverty at trial and averred he had only "the clothes on his back "after the Internal Revenue Service finished with him, the record indicates his tax payments were miniscule. At trial he admitted to owing in excess of $7,000,000 in taxes, interest and penalties, of which he had paid several percent. Of the one $800,000 Swiss bank account the Internal Revenue Service was able to identify, $500,000 went to Markowitz's lawyers. A $250,000 transfer to Markowitz Stables which he could not recollect (there was a period during the trial when he couldn't "remember who owned Markowitz Stables"), may have been the balance of that sum.

Counsel for petitioner went to great lengths to locate the funds and collected a significant amount of documentation

(including checks which the trial court suppressed, along with the cross-examination prepared based on the documents and checks which would have demonstrated the bias of the key government witness because of his enormous financial interest in "pleasing" the government. When motions were made after the end of trial with respect to jury improprieties, it was discovered that the jurors had made up their minds about the guilt of defendants immediately after Markowitz's testimony. There were only several witnesses before Markowitz - none of them critical to the government's case. This state of facts is the perfect example of what creates bias and motive to lie, the right to cross-examine with respect to which, this court has carefully guarded over the years. Harper reaffirmed, as did the Supreme Court in Delaware v. Van Arsdall, 475 U.S. 673 (1986), that "tri-

al judges retain wide latitude, insofar as the Confrontation Clause is concerned to impose reasonable limits on...cross-examination ...." Id. at 679.

The court indicates that not every erroneous ruling that improperly restricts cross-examination necessarily implicates the Confrontation Clause; rather, the Constitution only "guarantees an opportunity for effective cross-examination, not cross-examination that is effective, in whatever way, and to whatever extent, the defense might wish." Id. (quoting Delaware v. Fensterer, 474 U.S. 15,20 (1985)(per curiam)). In Harper, the court said "...the vital importance of the opportunity to probe the reliability of the indentification and trial court's total preclusion of cross-examination [relating to the identification] readily implicate the constitutional guarantee." As in the case here at issue, the [government] argued

and the [court] held that the resulting Confrontation Clause error, if any, was harmless. Van Arsdall, 475 U.S. at 684, was cited for the propositions that to determine whether harmless error occurred, many factors have to be considered, including the importance of the the witness' testimony to the prosecution's case, whether the testimony was cumulative, whether there was corroborating or contradictory testimony with respect to the material points of the witness' testimony, the extent of cross-examination otherwise allowed and the over-all strength of the prosecution's case.

Again going to Van Arsdall for direction, it was indicated that a Confrontation Clause error can be harmless only if, "assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harm-

less beyond a reasonable doubt." The court disagreed with the holding in the lower court and found "that the state failed to meet its heavy burden of proving harmless error. (Emphasis supplied.)

In Davis v. Alaska, 415 U.S.308, it was observed that, subject to " the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation..., the cross-examiner has traditionally been allowed to impeach, i.e., discredit the witness." The court emphasized the "exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Id., at 316-317. In Van Arsdall, supra, Davis was reaffirmed and the Court held that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise

appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors...could appropriately draw inferences relating to the reliability of the witness.'" In Olden v. Kentucky, 488 U.S. 227 (1988) the Court said "Here, [witness'] testimony was central, indeed crucial, to the prosecution's case."

Markowitz's testimony was crucial to to the prosecution of petitioner because he was the only witness to attribute to petitioner some direct knowledge of the crimes Markowitz perpetrated. The government's case had no strength without Markowitz's testimony. Certainly, Markowitz's testimony was anything but cumulative - not only because of the timing of his testimony but, more importantly, because most of his damaging testimony related to purported meetings and tel-

ephone conversations between he and petitioner when no else was present or listening. Markowitz's recollections from this period were nothing less than extraordinary, even though he was both a severe cocaine addict and alcoholic during the entire period at issue. (His extraordinary 99 percent plus recollection when answering at least 3,000 questions posed to him by the prosecution, even recollecting complex securities and tax rules of the late 1970s and early 1980s, was a sharp contrast to his dismal recollection to hundreds of questions posed to him on cross-examination relating to to whether he recognized documents bearing his signature or remembered writing many large checks - some in six figures).

Because of the character of his testimony, there was very little corroborating or contradictory testimony. The government paraded a number of witnesses

before the jury who indicated that at some point or other (mostly in 1982 or early 1883, approximately when petitioner's relationship with Markowitz completely terminated) they had "suspicions" about Markowitz of which they made petitioner aware. Interestingly, all these witnesses either had some form of immunity or had made some other "arrangement" with the government, e.g., the trader (Tom Walsh who wrote the original fraudulent trade tickets in early 1980) later became a certified public accountant ;Markowitz, through his wife, ended up with a small airline in Maryland, somehow securing all of the necessary local, state and federal licenses; one witness filed claims for reward with the Internal Revenue Service relating to well in excess of one hundred investors in Markowitz related entities. Markowitz and his in-house accountant (one Peter

Stefanou) both plea bargained and were rewarded with sentences of probation after trial. Not to be ignored, is the more than several dozen unindicted co-conspirators named by the government - a very effective tool!

While many hours of cross-examination were allowed, most proved unproductive because Markowitz provided few concrete answers. Petitioner's constitutional guarantee of "an opportunity for effective cross-examination ...." (see, Van Arsdall) was violated by the court's refusal to admit proffered checks in evidence (thus totally precluding critical cross-examination) to establish Markowitz's powerful financial incentive to curry favor with the government. In addition, many hours of cross-examination could have been avoided if the checks were admitted. The long examination counsel was constrained to conduct may

well have annoyed the jurors and created feelings of sympathy for the beleaguered government witness.

While government argues the various rewards doled out to prosecuion witnesses are critical to effective law enforcement, it is important that the Court remind them that enforcing the law does not include the right to breach defendants' constitutional rights.

The instant petition should therefore

be granted so that the Court can establish, once and for all, that government may not hide its pecuniary arrangements with prosecution witnesses and thus effectively violate defendants' Sixth (and Fourteenth) Amendment rights.

B. Government's Deliberate Defiance (and The Acceptance Thereof by Both The District Court and The Court of Appeals) of The "Presumption of Innocence" Should Not Be Tolerated by This Court

In Morgan, the Second Circuit stated in no uncertain terms that hypothetical questions that assume the guilt of the accused "should not be asked" of "non-expert character" witnesses called by the defense. Notwithstanding Morgan and a long line of like decisions in other circuits, the government pressed for and obtained a ruling permitting such questions. Three weeks after erroneously

allowing the prosecution to pose such hypothetical quesiton, in a written opinion dated January 25, 1989, The trial court reaffirmed its earlier oral ruling and condoned the government's improper cross-examination. (See, Appendix D.) Upon issuance of the court's opinion, counsel for petitioner apprised the court that, in view of the ruling, they felt constrained not to call any character witnesses on the defense case. (Petitioner's counsel offered to place on the record a list of proposed character witnesses.

Judge Sweet observed that "the rationale of [Morgan] makes no sense...." He acknowledged, however, that the issue was a difficult one, and "hope[d] that [the government] think[s] I am right." He further observed that "courts have said these questions are bad, but they don't get a reversal because it's not

prejudicial error." Weighing that factor into the balance, the trial court adhered to its earlier ruling. The prosecutor's questions improperly elevated accusations to the status of accepted fact and thereby generated a presumption of guilt arising entirely out of the charges on which petitioner was being tried.

In order to avoid the government's repeated incantation of this presumption of guilt, petitioner chose not to call a series of additional character witnesses who would have otherwise testified in his defense. (Unfortunately, the absence of such additional proof probably prompted the jury to conclude that petitioner was unable to produce favorable character witnesses. The trial court's egregious error in violating the presumption of innocence prevented petitioner from calling witnesses and thus mounting a critical portion of his defense. The

presumption of innocence is a hallowed principle of criminal law and its conscious violation by the trial court should make this case per se reversible. When the trial court knowingly joins with the government in violating a defendant's Sixth and Fourteenth Amendment rights on the theory that the error is probably not reversible, it would seem that the Supreme Court of the United States would have sufficient concern to advise the courts of appeals that they should not tolerate this kind of Russian roulette with constituional rights from the trial courts.

At oral argument on this appeal, the prosecutor who tried the case conceded that "it was a mistake on our part to push that [issue] the way we did." Nevertheless, after observing that "Morgan is quite clear in its condemnation of guilt assuming hypothetical

questions asked of lay character witnesses," and that its "forceful declaration" should not have been "disregarded" in this case, the panel affirmed petitioner's conviction -- albeit with acknowledgement that "[w]hat we have just said might be expected to lead to a reversal in this case...."

Here, the government took a calculated risk in urging the trial court to depart from Morgan and its progeny in other circuits. In these circumstances, the panel's failure to reverse will have the unintended and untoward effect of affording the government "a license to disregard procedural constraints announced by an appellate court." The government's deliberate defiance of the court of appeals' prior decision, and the court of appeals' tolerance of such defiance, is one more reason that petitioner did not receive a fair trial. It

is also strong evidence that the court of appeals so departed from the accepted course of judicial proceedings that the supervision of the United States Supreme Court is called for. Thus, the instant petition should be granted.

C. <u>The Admission of The Government's Summary Chart Violated Strong Second (And Other) Circuit Precedent Against The Improprieties Surrounding Its Preparation and Admission; The Courts of Appeals Should be Advised That They May Establish Rules and Change Them - Not Ignore Them</u>

As its final witness, the government called an Internal Revenue Agent, through whom the government introduced a chart that purported to summarize the gross trading losses and expenses for each of the relevant Markowitz entities. The trial court allowed the chart into evidence after asking the government if it was sure that the numbers were

accurate and receiving a loud affirmance from the prosecutors, despite the vociferous objections of defense counsel. As it turned out, the government had no idea of what it was introducing into evidence and the agent had not kept any meaningful records relating to the preparation of the numbers because he had "inadequate assistance". The trial court's actions flew in the face of strong precedent in its own circuit (see, Dioguardi and Citron, supra) relating to the admission of such charts.

Even after the defense cross-examination revealed numerous and (as the trial court acknowledged) "substantial errors" in the calculations, the court refused to strike the government's "tottering" chart. Instead, the trial court repeatedly invited the government to withdraw the exhibit, inquiring whether the prosecutor still wanted to "go forward...and

take our chances" with the chart.

Once again, the government chose to disregard clear precedent and take its chances, and once again, the court of appeals found error but declined to enforce the mandate of the court of appeals' prior decisions. The court of appeals observed that the trial court permitted the government to correct the many mistakes uncovered during cross-examination by the defense. With due respect to the court of appeals, this analysis misses the mark. First of all, it should not have fallen to the defense to identify for the government where its exhibit required corrections; given the government's inability to demonstrate the reliability of its calculations, the chart and its glaring erroneous figures should never have been exposed to the jury at all, let alone for approximately two weeks. The chart was an extremely

"potent weapon for harm" whose four foot by six foot presence unfairly prejudiced the petitioner before the jury. Again, this petition should be granted because of the dramatic departure by both of the lower courts from the accepted course of judicial proceedings.

D. The Court of Appeals' Failure to Reverse, Sanctioned The Failure of The District Court To Provide Petitioner With A Fair Trial

Having grossly exaggerated the record to bolster its claim of harmless error, the government, without analysis or citation to authority, summarily dismissed petitioner's claim before the court of appeals that the combination of the trial court's erroneous rulings deprived the petitioner of a fair trial.

The courts have long held that the test of whether error is harmless is not whether, disregarding the erroneously

introduced evidence, there was other evidence which was independantly sufficient to establish defendant's guilt. This principle applies with particular force where, as here, the trial court's erroneous rulings compromised every aspect of petitioner's defense, and led to the improper exclusion of defense evidence and preclusion of critical defense cross-examination, as well as the improper introduction of unfairly prejudicial government proof and the failure to review jury improprieties.

In assessing the prejudicial impact of the trial errors, a reviewing court should not have viewed the record in the light most favorable to the government; after all, erroneous rulings do affect the inferences drawn and credibility findings made by a jury. Thus, in conducting a harmless error analysis, the

court of appeals should have assumed the maximum "damaging potential" of evidence improperly admitted or excluded. See, Van Arsdall. Judged by these standards, and in light of the cumulative errors discussed above, the writ should be granted so that the Supreme Court of the United States can determine that the cumulation of evidentiary and procedural error of a trial court can in and of itself rise to the level of preventing defendants from having their constitutional right to a fair trial.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Dated: Scarsdale, New York
January 28, 1991

Respectfully submitted,

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APPENDICES

Appendices:

Appendix A. A-3

Appendix B. B-78

Appendix C. C-81

Appendix D. D-101

Appendix E. E-143

Appendix A

Opinion of Court of Appeals

Before NEWMAN and PRATT, Circuit Judges, and MUKASEY, District Judge.*

JON O. NEWMAN, Circuit Judge:

The primary issue on this appeal is whether the prosecution may cross-examine a defendant's character witness by asking questions based on an assumption that the defendant is guilty of the offense charged. This issue arises on an appeal by Michael P. Oshatz and Leonard A. Messinger from their judgments of conviction entered, respectively, on July 14 and May 5, 1989, in the District Court for the Southern District of New York (Robert W. Sweet, Judge) after an eleven-week jury trial on charges arising out

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* The Honorable Michael B. Mukasey of the District Court for the Southern District of New York, sitting by designation.

of their involvement in a series of fraudulent tax schemes. We reaffirm this Circuit's view that such cross-examination is impermissible, but nonetheless affirm the convictions because our prior pronouncement on this issue was understandably misinterpreted by the District Court and the resulting error was harmless in the circumstances of this case.

Background

Between 1979 and 1983, Oshatz, a tax attorney, assist in the formation of a number of affiliated partnerships known as the "Monetary Group." The offering memoranda for the Monetary Group reported that the partnerships would invest in various financial instruments to secure economic gain, that these investments would involve substantial market risk, and that any losses

generated by these transactions would be available as tax deductions. Oshatz and Messinger, his law partner, also formed a number of other partnerships, in which they held an interest, for the purpose of purchasing tax shelter investments from the Monetary Group.

The Monetary Group partnerships engaged primarily in two types of securities transactions on behalf of their limited partner investors. Initially, the partnerships entered into "straddle" transactions in which "short" and "long" positions are simultaneously established in a commodity or a security. At the end of the year, the side of the transaction with a loss is closed out, generating a tax deduction. At the beginning of the next year, the other "leg" of the transaction is closed out,

generating a taxable gain. After Congress passed legislation curtailing the use of straddle transactions, *see* Economic Recovery Tax Act of 1981, Pub.L. No. 97-34, 95 Stat. 172, 323-26, the partnerships entered into repurchase ("repo") agreements as investment vehicles. This type of arrangement involves the purchase of a security with borrowed money, with the security serving as collateral for the loan. In "open" repurchase agreements, the interest charge on the loan fluctuates with the prevailing market rate, entitling the investor to an interest expense deduction since a profit or loss may be realized on the transaction. Open repurchase agreements functions much like straddle transactions since the interest on the loan may be deducted immediately, while the gain from the underlying security,

generally a Treasury bill, is not realized until the next taxable year.

The Government offered convincing proof that the tax losses reported by the partnerships from these transactions were not the product of legitimate trading. Edward Markowitz, the head trader for the Monetary Group, testified that he falsified trade documents to reflect straddle transactions that never occurred. The partnerships also removed the risks associated with repurchase agreements by fixing the interest rate of the loan to coincide with the interest rate of the securities that collateralized the loan. Though this type of arrangement, known as a "repo to maturity" repurchase agreement, is legal, it provides no basis for claiming an interest expense deduction since no profit or loss can be realized in connection with the

interest charges. To generate the desired tax losses, the partnerships financed repurchase agreements by using fixed "repo to maturity" rates but fraudulently documented the transactions as "open" repurchase agreements. *Cf. United States v. Atkins*, 869 F.2d 135, 138 (2d Cir.), *cert. denied*, -- U.S. --, 110 S.Ct. 72, 107 L.Ed.2d 39 (1989).

The Government brought a sixteen-count indictment against Oshatz and Messinger for their roles in the trading activities of these partnerships. Count One charged both defendants with a conspiracy to defraud the United States, in violation of 18 U.S.C. § 371 (1988), by engaging in fraudulent securities transactions for the purpose of generating tax losses. The remaining counts alleged that one or both of the defendants aided in the filing of false tax returns for

various partnerships, in violation of 26 U.S.C. § 7206(2) (1988), and that both defendants knowingly and willfully filed false personal income tax returns, in violation of 26 U.S.C § 7206(1) (1988). The jury returned guilty verdicts against Oshatz and Messinger on each of the counts in which they were charged. The District Court sentenced Oshatz to forty months' imprisonment and three years' probation. Messinger was sentenced to twenty-eight months' imprisonment and three years' probation.

Discussion

Appellants challenge the cross-examination of character witnesses, the admission of similar acts evidence, the exclusion of evidence claimed to impeach the

credibility of a prosecution witness, and the admission of a summary chart.

I. Cross-Examination of Character Witnesses

Defense counsel questioned Gail Logan as to the reputation of Oshatz for truthfulness and honesty and as to her opinion of his truthfulness and honesty, eliciting testimony favorable to the defense. Logan, who had been an associate in defendants' law firm, had originally been called as a Government witness and became a character witness for Oshatz during cross-examination. For convenience, we will consider the defense questioning that elicited her character testimony to be direct examination and the prosecution's questioning that challenged her character testimony to be cross-examination. On cross-examination, the prosecutor asked, "If I were to show you that Mr. Oshatz knew

that the Markowitz transactions were backdated, would that affect your opinion?" Objection was made and overruled. Logan answered, "Yes." Similar questions were asked and similarly answered with respect to other aspects of the wrongdoing alleged to constitute the offenses for which Oshatz was on trial. After the witness was excused, counsel for both defendants challenged the Government's right to cross-examine a character witness with hypothetical questions based on an assumption of guilt as to the pending charges. The next day defense counsel called Judge Sweet's attention to several opinions that appeared to proscribe the challenged cross-examination, including this Circuit's decision in *United States v. Morgan*, 554 F.2d 31 (2d Cir.), *cert. denied*, 434 U.S. 965, 98 S.Ct. 504, 54 L.Ed.2d 450

(1977). In that decision we had said that "[i]nsofar as non-expert character witnesses are concerned," a hypothetical question that assumes the guilt of the defendant "should not be asked." *Id.* at 34.

Before the end of the trial, Judge Sweet filed an opinion rejecting the defendants' objection to the cross-examination.[1] *United States v. Oshatz*, 704 F.Supp. 511 (S.D.N.Y.

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[1] In support of his ruling, Judge Sweet cited *Lopez v. Smith*, 515 F.Supp. 753, 746 (S.D.N.Y. 1981), and *United States v. Senak*, 527 F.2d 129, 145-46 (7th Cir. 1975) *cert. denied*, 425 U.S. 907, 96 S.Ct. 1500, 47 L.Ed.2d 758 (1976). *Lopez*, though citing *Morgan* with a "cf." signal, ruled only that the cross-examination of a character witness was no basis for finding a constitutional error that would entitle a state court defendant to habeas corpus relief. In *Senak*, the witness was asked only if he knew of the allegations made by trial witnesses; the Seventh Circuit pointed out that the witness was not asked whether his opinion would be different if he knew that the allegations were true, 527 F.2d at 146.

1989). He observed that under Federal Rule of Evidence 405(a) character witnesses may be cross-examined as to their knowledge of specific instances of a defendant's misconduct in order to help the jury determine how much weight to accord the character testimony, *id.* at 514; *see United States v. Birney*, 686 F.2d 102, 108 (2d Cir. 1982), and that cross-examining about the misconduct at issue in the trial presented "nothing new to the jury," *United States v. Oshatz*, 704 F.Supp. at 514. Noting *Morgan*, he said that its distinction between expert and non-expert character witnesses does not appear in Fed.R.Evid. 405(a). He also rejected *Morgan's* view that the challenged cross-examination involved hypothetical questions, contending that "the fact that a defendant has yet to be convicted for an

unlawful act does not make a question regarding that act 'hypothetical.'"[2] *Id.*

Armed with Judge Sweet's ruling and undeterred either by *Morgan* or by the risk that disregarding it would imperil any conviction that might be obtained, the prosecutor cross-examined Messinger's character witnesses who had testified as to both his reputation for honesty and truthfulness and their own opinion of these character traits. The form of the cross-examination was even more pointed than with Logan. To one witness the prosecutor asked,

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[2] Though we agree that a question about misconduct not yet the subject of a conviction is not necessarily hypothetical, the questions asked in this case of Logan and subsequent character witnesses were hypothetical in two respects. The witnesses were asked whether their opinions would be affected *if* the defendant had done the acts of which he was accused and *if* the witness knew of such misconduct.

"[I]f you found that Mr. Messinger knowingly participated in setting up a phony tax shelter that generated over half a million dollars worth of business for his law firm, would that affect your opinion?" When objection to the form "If you found" was sustained, the question was rephrased, "So let's leave the facts aside and assume that it is found that Mr. Messinger knowingly participated in setting up a phony tax shelter that generated over half a million dollars worth of business for his law firm, would that affect your opinion?" The witness said it would not. Judge Sweet instructed the jury that the question involved a Government contention, that it was allowed as bearing only on the witness's credibility, and that its allowance did not alter the jury's responsibility. Another witness was

similarly cross-examined with the question beginning "If the government were to establish that . . . ." With another witness, the prosecutor reverted to the form, "Assume that it were found"; when the witness inquired, "Found by the jury?" and was answered by the prosecutor, "Or found as a fact, correct," the witness replied, "They could be wrong."

We consider whether *Morgan* proscribes the challenged cross-examination, whether *Morgan* should have been followed in this case, and whether the failure to follow *Morgan* warrants reversal.

1. *What does Morgan mean?* *Morgan* began its discussion of the scope of cross-examination of character witnesses by noting that the cases cited by appellant for the proposition that questions based on an

assumption of guilt on the pending charges are improper involved testimony about the defendant's reputation in the community. Judge Van Graafeiland then pointed out that Rule 405(a) had broadened the prior law to permit a witness to give an opinion as to a trait of character that is in issue. He then noted that opinion testimony of "*expert* witnesses has traditionally been given in response to hypothetical questions based upon the evidence in the case . . . and this form of questioning may properly be used on cross-examination as well as direct." 554 F.2d at 33 (emphasis added) (citations omitted). "Time and again," he continued, "*experts* are asked hypothetical questions which assume the very facts upon which the defendant's guilt is predicated." *Id.* (emphasis added). He concluded that the hypothetical question

asked in Morgan "was not prejudiciously improper so as to mandate reversal." *Id.*

Judge Van Graafeiland then added the following:

> It does not follow from this holding that we approve of the question which was asked. Because it is too early in the history of Rule 405 to predict how much use ingenious counsel will make of opinion testimony from witnesses who may qualify as experts on traits of character, we are reluctant to prescribe an evidentiary rule which will inhibit full cross-examination of any such expert. Insofar as non-expert character witnesses are concerned, however, we believe that the probative value of a hypothetical question such as the one at issue herein is negligible and that it should not be asked. The jury is in as good a position as the non-expert witness to draw proper inferences concerning the defendant's character from its own resolution of the issue. *Cf.* Wigmore [on Evidence] § 679 [1940].

Id. at 34.

Judge Mansfield joined the panel opinion and added a concurring opinion to underscore his view of the vice of putting to a character witness questions that "asked the jury to assume the defendant to be guilty of the very charge on trial." *Id.* (Mansfield, J., concurring).

There is arguably an ambiguity as to the meaning of *Morgan*, arising from its discussion of expert and non-expert witnesses. Without categorizing the witness in *Morgan* as either expert or non-expert, the Court acknowledged the latitude to be accorded district judges in permitting cross-examination of expert witnesses with hypothetical questions based on facts on which the defendant's guilt is predicated, yet condemned that very type of question, which was asked of the witness in *Morgan*.

Possibly that ambiguity led Judge Sweet to conclude that *Morgan* does not bar hypothetical questions, based on an assumption of guilt, asked of a witness who offers an opinion about the defendant's character. We note that the District of Columbia Circuit, though ruling that such hypothetical questions may not be asked of a character witness testifying only as to the defendant's reputation, has cited *Morgan* for the proposition that such hypothetical questions may be asked of a character witness offering an opinion as to the defendant's character. *See United States v. White*, 887 F.2d 267, 274-75 (D.C. Cir. 1989).

[1] We thing *Morgan* is quite clear in its condemnation of guilt-assuming hypothetical questions asked of lay character witnesses like friends or neighbors, whether

testifying about a defendant's reputation for a character trait or expressing an opinion about such a trait. As to such non-expert character witnesses, *Morgan* is emphatic that a hypothetical question based on an assumption of guilt "should not be asked." 554 F.2d at 34. We note that three circuits have correctly read *Morgan* as prohibiting use of guilt-assuming hypothetical questions in cross-examination of non-expert character witnesses. *See United States v. McGuire*, 744 F.2d 1197, 1204-05 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004, 105 S.Ct. 1866, 85 L.Ed.2d 159 (1985); *United States v. Williams*, 738 F.2d 172, 177 (7th cir. 1984); *United States v. Polsinelli*, 649 F.2d 793, 796-97 (10th Cir. 1981).

What *Morgan* left open is the possibility that under Rule 405(a), a trial judge might

permit an expert witness, for example a psychiatrist, to offer an opinion on a character trait such as truthfulness. If Rule 405(a) might one day be read that broadly,[3] *see United States v. Pacelli*, 521 F.2d 135, 140-41 (2d Cir. 1975) (no abuse of discretion to exclude psychiatrist's testimony offered to impeach credibility of witness), *cert. denied*, 424 U.S. 911, 96 S.Ct. 1106, 47 L.Ed.2d 314 (1976), the panel did not wish to foreclose the possibility that guilt-assuming hypothetical questions may be asked of the expert character witness, just as other expert witnesses, such as Internal Revenue Service agents in a tax fraud case, may be asked hypothetical questions based on facts offered to establish

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[3] We regard this only as a possibility and express no view on it.

the defendant's guilt. *United States v. Morgan*, 554 F.2d at 33.

We do not doubt that to some extent a guilt-assuming hypothetical question might be probative of the credibility of testimony given by a non-expert character witness. Steadfast adherence to a favorable opinion by a witness asked to assume the defendant's guilt might provide some basis for concluding that the witness is simply supporting the defendant, rather than providing credible testimony about his character. But we share the view of all members of the *Morgan* panel that such cross-examination is nevertheless to be prohibited because it creates too great a risk of impairing the presumption of innocence. Moreover, after a jury has repeatedly heard a prosecutor assure a trial judge that he has a good-faith basis for

asking permitted hypothetical questions, the jury might infer from the judge's permission to ask a guilt-based hypothetical question that the prosecutor has evidence of guilt beyond the evidence in the record.

In reaffirming *Morgan*, we note that every circuit to have considered the issue, except the District of Columbia Circuit,[4] *see United States v. White*, *supra*, has agreed that guilt-assuming hypothetical questions

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[4] In ruling that a character witness who gives an opinion about the defendant's character, as distinguished from testimony about the defendant's reputation, may be cross-examined with guilt-assuming hypothetical questions, the District of Columbia Circuit relied not only on our *Morgan* decision but also on *United States v. Polsinelli*, *supra*, and *United States v. Palmere*, 578 F.2d 105 (5th Cir. 1978) (per curiam), *cert. denied*, 439 U.S. 1118, 99 S.Ct. 1026, 59 L.Ed.2d 77 (1979). *See United States v. White*, 887 F.2d at 275. We do not believe that any of these decisions supports the proposition for which it was cited.

should not be asked of character witnesses: Fourth Circuit, *United States v. Siers*, 873 F.2d 747, 749-50 (4th Cir. 1989) (opinion and reputation testimony); Fifth Circuit, *United States v. Palmere*, 578 F.2d 105, 107 (5th Cit.) (per curiam) (same), *cert. denied*, 439 U.S. 1118, 99 S.Ct. 1026, 59 L.Ed.2d 77 (1978); Sixth Circuit, *United States v. McGuire*, 744 F.2d at 1204-05 (same); Seventh Circuit, *United States v. Williams*, 738 F.2d at 176-77 (same); Eighth Circuit, *United States v. Barta*, 888 F.2d 1220, 1224-25 (8th Cir. 1989) (reputation testimony); Tenth Circuit, *United States v. Page*, 808 F.2d 723, 731-32 (10th Cir.) (same), *cert. denied*, 482 U.S. 918, 107 S.Ct. 3195, 96 L.Ed.2d 683 (1987). In some cases, use of such questions on cross-examination has resulted in reversal of a conviction. *See United States v.*

Polsinelli, *supra* (reputation testimony); *United States v. Candelaria-Gonzalez*, 547 F.2d 291 (5th Cir. 1977) (same).

2. *Should Morgan have been followed in this case?* Having concluded that *Morgan* disapproves of cross-examination of non-expert character witnesses with questions that assume the guilt of the defendant, we next consider whether *Morgan* should have been followed in this case. Initially, we note that there is some question whether the views of the *Morgan* panel and the supplemental concurring views of Judge Mansfield are dicta. The structure of the opinion suggests that they are. Judge Van Graafeiland's opinion for the Court first announces that asking the hypothetical question "was not prejudiciously improper so as to mandate reversal," 554 F.2d at 33, then observes the

"[i]t does not follow from this holding that we approve of the question," *id.* at 34, and concludes that "it should not be asked," *id.* Comments following a holding are often dicta. On the other hand, the opinion can be read to "hold" that the question was improper and to make the further holding that the error in permitting the question did not warrant reversal because the question was "not prejudiciously improper."

[2, 3] Even if the panel's disapproval is regarded as dictum, we think it important to make clear that this is dictum that should have been followed in this case and in subsequent cases. We acknowledge that not every observation contained in an opinion of this Court deserves to be regarded as the law of this Circuit. Opinion authors frequently express thoughts peripheral to the holding of

a case, and these thoughts do not bind the Circuit, nor even the concurring judges on the pane. If every phrase in an opinion were accorded binding effect, there would be a tendency either to refine language with such meticulous care as to imperil the prompt disposition of the Court's work or to reduce opinions to bare pronouncements of holdings. The latter course might be welcomed by some members of the bench and bar, but it would be inconsistent with the time-honored tradition of crafting opinions that seek not only to pronounce results but also to explain reasoning, to stimulate informed commentary, and, on occasion, to provoke future consideration of emerging issues.

[4, 5] Nevertheless, in some contexts expressions of view by an appellate court must be regarded as the law of the circuit,

even though not an announcement of a holding or even of a necessary step in the reasoning leading to a holding. *See United States v. Bell*, 524 F.2d 202, 205-06 (2d Cir. 1975). One such context is the clear statement of an approved or disapproved aspect of trial court procedure. The orderly administration of justice requires certainty as to many details of trial procedure, yet it would be subversive of such administration to order a reversal every time a disapproved procedure was used. In some cases we tolerate a disregard of clear prohibitions, recognizing that not every opinion of ours is etched in the memory of the trial bench or the trial bar, that unforeseen matters often arise in the courtroom so quickly and require such prompt disposition as to preclude even hurried research, and that a procedural

misstep often does not impair "substantial rights," *see* Fed.R.Crim.P. 52(a); Fed.R.Civ.P. 61. But harmless error rules are not a license to disregard procedural constraints announced by an appellate court.

[6] *Morgan* illustrates the type of appellate guidance that, even if dictum, is not to be disregarded. The guidance concerns an aspect of trial procedure, one likely to recur with frequency. Moreover, the guidance is not a tentative expression of views, but a forceful declaration: "a hypothetical question such as the one at issue herein ... should not be asked." 554 F.2d at 34. Though it has been said that the only word in a judicial opinion that prosecutors understand is "reversed," we urge them, unless they wish to see this word more often,

to add to their lexicon the words "should not."

[7] 3. *Does Disregard of* Morgan *Require Reversal?* What we have just said might be expected to lead to a reversal in this case, but we conclude that a reversal is not warranted. Looking first at traditional harmless error considerations, we are satisfied that the improper cross-examination created no substantial risk of prejudice. Judge Sweet gave the jury prompt and sufficient cautionary instructions, pointing out the limited purpose for which the questioning was permitted and reminding the jurors of their ultimate responsibility to determine guilt or innocence. Moreover, the evidence of guilt was so substantial as to preclude any reasonable likelihood that the

improper cross-examination contributed to the verdicts.

[8] Nevertheless, we are troubled by the disregard of *Morgan*, especially by the Government's urging the District Court to permit what *Morgan* condemns, even after that decision was called to the Court's attention by defense counsel. Our readiness to reverse in such circumstances is diminished in this case, however, by our acknowledgement that, though we believe that *Morgan* is clear, the opinion is susceptible to misinterpretation. Indeed, the District of Columbia Circuit in *White* has interpreted *Morgan* to support the very cross-examination that we believe it condemns. Under the circumstances, the Government was entitled to urge an interprtation of *Morgan* favorable to its position, and the District Judge cannot be

faulted for misreading *Morgan* as he did. A reversal would not be a justified response to what occurred in the trial court. We trust, however, that the matter has now been sufficiently clarified to deny the Government any reason to think that a subsequent disregard of *Morgan's* admonition will be overlooked.

II. Similar Acts Evidence

[9] Oshatz and Messinger challenge the District Court's decision to admit evidence of their involvement in several other fraudulent tax schemes not charged in the indictment. The defendants contend that the Government failed to show that they participated in these uncharged acts with the knowledge and intent to defraud, and that under cases such as *United States v. Afjehei*, 869 F.2d 670 (2d Cir. 1989), and *United*

States v. Peterson, 808 F.2d 969 (2d Cir. 1987), such acts are not to be considered "similar" to the charged crimes absent a demonstration of criminal intent. Alternatively, the appellants contend that even if the evidence were admissible under Rule 404(b) of the Federal Rules of Evidence, it was precluded by Rule 403 because its prejudicial effect outweighed its probative value.

We are satisfied that the evidence sufficed to permit the inference that the defendants knowingly participated in each of the alleged similar acts. The first similar act concerned Joseph Bachman, a stock options trader who claimed to have engaged in a separate tax fraud with Oshatz and Messinger. Bachman testified that in 1980 and 1981 the defendants helped form several limited

partnerships, known collectively as the Yardley entities, for the sole purpose of providing tax deductions to investors. Bachman alleged that he had informed the defendants that the Yardley entities would engage in "fully hedged" transactions. The defendants maintain that this disclosure does not establish their knowledge of the fraud, observing that not all hedged transactions are illegal and that nothing else Bachman told them should have alerted them to the fraudulent nature of the trades. This argument, however, ignores Bachman's testimony that at a meeting with the defendants he had clarified that the transactions would involve "no risk of capital." In view of the efforts of Messinger in preparing offering memoranda for the Yardley entities and of Oshatz in

soliciting investors, the evidence was sufficient for a jury to conclude that the defendants knowingly participated in a fraudulent trading scheme.

The second similar act stemmed from the defendant's relationship with David Lamb, a London commodities broker. In late 1982 Oshatz and Messinger hired Lamb to replace Markowitz as the trader for Trend Capital Associates, a partnership in which both defendants held an interest. Peter Stefanou, the accountant for Trend Capital, testified that though Lamb was not hired until sometime after September 1982, trading statements indicated that he had made substantial trades on behalf of the partnership as early as July of that year. The Government contends that these trades were fabricated and that the defendants knew of the fraudulent nature of

the tax losses generated by Trend Capital. The Government established that the bulk of a half million dollars purportedly forwarded to Lamb as a margin payment had been placed in a joint account controlled by Oshatz and Messinger. This evidence sufficed to permit the inference that the defendants knew that these trades, for which little or no margin was posted, were fraudulently backdated.

The third similar act concerned Laurel Capital Associates, a limited partnership formed by Oshatz in December 1983. The Government introduced evidence that Oshatz did not make his allotted $51,000 capital contribution to the partnership in 1983, but that Messinger, along with several others, belatedly made this capital contribution in return for Oshatz's share of the partnership's losses. The defendants do not

dispute the illegality of purchasing tax losses after they have occurred. Rather, they argue that this proof does not demonstrate that they knew the Laurel Capital Trades were spurious, rendering evidence of their involvement in the Laurel Capital partnership sufficiently similar to the crimes charged in the indictment. We disagree. The appellant's knowledge may be inferred from the improbability of their repeated claims of innocent involvement in the purchase of fraudulent tax losses. *See United States v. Kahan*, 572 F.2d 923, 933 (2d Cir.), *cert. denied*, 439 U.S. 833, 99 S.Ct. 112, 58 L.Ed.2d 128 (1978); 22 C. Wright & K. Graham, *Federal Practice and Procedure* § 5245, at 507 (1978).

The cases cited by the appellants do not require a contrary result. In *United States*

v. Afjehei, supra, the defendant was arrested entering the Unites States with a suitcase full of heroin. At trial the Government offered evidence of several prior trips that the defendant had taken. This Court reversed the defendant's conviction on the ground that this other act evidence should not have been admitted since the prior trips were "not shown to be other than innocent." 869 F.2d at 675. In *United States v. Peterson, supra*, the defendant was charged with possessing a stolen check made out to a third party. After the defendant denied knowledge that the check was stolen, the Government introduced evidence that the defendant had endorsed a second check that was made out to a third party. We reversed on the ground that since the Government failed to demonstrate that the defendant received the proceeds from the

second check or knew that it was stolen, there was no evidence that the defendant's possession of the second check was wrongful. Unlike *Afjehei and Peterson*, where nothing indicated that the other acts were criminal, in this case there was ample proof that the Laurel Capital transactions lacked economic substance. No margin money was ever posted for the Laurel Capital trades, even though the partnership engaged in transactions generating close to $1 million in tax losses. This evidence, coupled with the proof of the defendants' knowing participation in the other similar acts as well as in the crimes charged in the indictment, permitted the inference that they also knew the Laurel Capital losses were fraudulently generated. *See Huddleston v. United States*, 485 U.S. 681, 691, 108 S.Ct. 1406, 1502, 99 L.Ed.2d

771 (1988). Having ruled that this evidence was admissible under Rule 404(b), we reject the defendants' contention that the District Court exceeded its discretion in determining that the probative value of this evidence outweighed its prejudicial effect.

III. Exclusion of Cross-Examination Documents.

[10] Oshatz contends that the District Court improperly excluded certain documents offered during his cross-examination of Markowitz. On direct examination Markowitz testified that he had forfeited to the Government all of his possessions, including whatever money he had acquired through his affiliation with the Monetary Group. Oshatz cross-examined Markowitz about several transfers of substantial sums of money he allegedly had made to members of his family

or to family-controlled businesses. When Markowitz could not recall the transfers, Oshatz sought to introduce a number of checks Markowitz had drawn on account of the Monetary Services Corporation, an entity owned by Markowitz and his sister. In concluding that Rule 608(b) barred the admission of this extrinsic impeaching evidence, Judge Sweet rejected Oshatz's claim that the evidence was offered not to attack Markowitz's credibility but to establish that he had a motive to testify falsely on behalf of the Government--namely, to hide assets the Government would otherwise require him to forfeit.

On appeal, Oshatz argues that Judge Sweet excluded this evidence in the mistaken belief that he had no discretion to admit it. He claims that this ruling should be reviewed

not under an abuse of discretion standard but under the plenary review appropriate for the application of an erroneous legal standard. A fair review of the record, however, reveals that Judge Sweet understood, as he said, that this issue was "committed to the discretion of the trial court." In light of the wide latitude permitted Oshatz in cross-examining Markowitz and the speculative nature of the "motive" theory, Judge Sweet acted within his discretion in excluding the proffered evidence.

IV. Admission of Summary Chart

[11] Oshatz also contests the admission of a summary chart prepared by the Government. This chart listed both the gross losses generated by the defendant's activities and the annual losses suffered by each entity involved in the scheme. Oshatz

challenges both the Government's failure to produce, prior to trial, the computer program on which the chart was based and the District Court's conditional decision to admit the chart before ascertaining its accuracy. We have previously acknowledged the "great desirability" of making computer programs used in the preparation of a summary chart available to the defense a reasonable time before trial, *see United States v. Dioguardi*, 428 F.2d 1003, 1038 (2d Cir.), *cert. denied*, 400 U.S. 825, 91 S.Ct. 50, 27 L.Ed.2d 54 (1970), and have stressed that the Court should independently determine whether the summary chart "fairly represent[s] and summarize[s] the evidence upon which [it] is based," *see United States v. Citron*, 783 F.2d 307, 316 (2d Cir. 1986), *modified*, 853 F.2d 1005 (2d Cir. 1988). In this case, though

the Government did not produce the computer program before trial, Oshatz had ample time during trial to check the validity of the program and to cross-examine the Government's witness concerning errors in his calculations. And though the Court conditionally admitted the summary chart prior to determining the accuracy of its underlying figures, the Court permitted the Government to amend any incorrect figures in the chart before ultimately admitting the exhibit. Consequently, we do not believe Oshatz suffered any prejudice from the admission of the chart.

Conclusion

We have carefully considered the other claims of error and have concluded that they are without merit. The judgments of conviction are affirmed.

MUKASEY, District Judge, concurring:

I concur in parts II, III and IV of the majority opinion, and in the judgment. However, I believe respectfully that in part I the majority imposes a rule that excludes relevant evidence, in order to avoid only in part a danger that is in any event illusory, and does so on highly debatable authority. For those and other reasons set forth below, I write separately.

I.

A short discussion of basic principles is necessary to an appreciation of what the majority has withdrawn from a jury's consideration. After the effective date of the Federal Rules of Evidence in July 1975,[1] it became permissible in federal courts under

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[1] Pub.L. 93-595, § 3Jan. 1, 1975, 88 Stat. 1959.

Fed.R.Evid. 405(a) to offer evidence of a person's character by testimony not only as to reputation among others than the witness, but also as to witness' own opinion.[2] Particularly as applied to evidence of good character offered by a criminal defendant, the ultimate point of both kinds of testimony is the same: to suggest to the jury that because the defendant is a person of good character -- as shown either by a generally held opinion that he is, or by the witness' own opinion that he is -- he would not have committed a crime, and therefore did not commit the crime charged in the indictment.

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[2] "(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct."

See, 1A Wigmore, *Evidence*, § 52 (Chadbourn Rev. 1974) (hereinafter "Wigmore"); 5 Wigmore § 1608. The character judgment here thus has to do at its essence with whether a defendant adheres to a moral and ethical standard, and how likely it is that his behavior has conformed to that standard.

A jury evaluating the testimony of a reputation witness for the defendant in a criminal case must determine how accurately the witness has reported what others think, presumably as evidence by what they say. Accordingly, such a witness may be cross-examined about well-founded rumors circulating in the community concerning events having nothing to do with the crime on trial in order to determine whether the witness has reported accurately a community consensus. 3A Wigmore § 988. Because rumors

of the crime on trial would prove nothing about how likely it is that the defendant committed that crime, which is the ultimate point of character testimony, a reputation witness may not be cross-examined about such rumors. 5 Wigmore, § 1618.

A jury evaluating the testimony of an opinion witness, however, has a different focus. That jury must determine two things: how well the witness knows the defendant, and by what standard the witness judges the defendant. Both are essential in order for the jury to weigh the testimony. If the witness does not know the defendant well, it is unlikely the witness will have seen enough of the defendant's behavior to judge his character. If the witness's judgement is distorted either by such partisanship that the witness would think highly of the

defendant despite misbehavior, or by a warped ethical standard, the witness' opinion may be correspondingly discounted. A strong enough partisan would swear truthfully that the defendant is a person of good character even if he has committed the crime on trial; a witness who thinks the crime on trial is not inconsistent with good character would do the same. The question at issue in this case probes both the witness' bias and the witness' own standards by asking whether the witness would retain a favorable opinion of the defendant even if the evidence at trial proved guilt. In either eventuality -- bias or distorted ethics -- the excluded testimony would be bound to alter the value the jury sets on the opinion. Thus the testimony the majority withdraws from the jury is valuable

and relevant in determining by what standard the witness has judged the defendant.

The majority concedes that its rule excludes relevant testimony, *supra*, at 539, but invokes the specter of greater evils -- prejudice to the defendant from two ideas that might infect the jury: first, that the presumption of innocence is attenuated or inapplicable; and second, that the prosecutor has undisclosed evidence of the defendant's guilt. *Id.*

The first is utterly illogical. There is no chain of reasoning by which a rational jury could conclude that a question calling for a witness to indulge an assumption for the purpose of testing that witness's opinion invites the jury to indulge the same assumption when weighing the evidence of which that opinion is a part. Moreover,

consider the setting in which the jury would succumb to this hypothesized illogic. As part of their orientation in this Court House, an orientation that is not unique either among or to federal courts, jurors are shown a film designed to impress upon them the importance of their duties. That film includes reference to the presumption of innocence in criminal cases. Also, it is a routine part of the voir dire in criminal cases to explain this presumption to jurors, to tell them they are obligated to apply it, and to exclude for cause those who cannot promise upon oath that they will apply it. Further, and most important in my view, a trial judge would instruct the jury specifically, as did the trial judge here, that the question is limited to testing the witness's views and does not bear on guilt or

innocence, which is for the jury to decide. Finally, the presumption of innocence is a central and mandatory feature of the jury charge, *Taylor v. Kentucky*, 436 U.S. 478, 486 n. 13, 98 S.Ct. 1930, 1935 n. 13, 56 L.Ed.2d 468 (1978), and one often alluded to by defense counsel in their summations even before the charge is delivered. To fear that a jury so oriented, so sworn and repeatedly so instructed would be impelled by the hypothetical question at issue here to the illogical conclusion suggested by the majority is to fear a phantasm.

Next, the majority urges that "after a jury has repeatedly heard a prosecutor assure a trial judge that he has good-faith basis for asking permitted hypothetical questions, the jury might infer form the judge's permission to ask a guilt-based hypothetical

question that the prosecutor has evidence of guilt beyond the evidence in the record." *Supra* at 539. Although no explicit reference is provided, the majority seems to be talking about questions of the "Have-you-heard" variety posed to a reputation character witness, which the court should be assured have some factual basis before the court allows them. 3A Wigmore, § 988. *See Michelson v. United States*, 335 U.S. 469, 481 and n. 18, 69 S.Ct. 213, 221 and n. 18, 93 L.Ed. 168 (1948); *United States v. Birney*, 686 F.2d 102, 108 (2d Cir. 1982). However, the jury in this case never heard any such assurance from the prosecutor to the trial judge; nor would a jury in any other case hear it, because no capable trial judge would permit such assurances to be given in the jury's presence. *Michelson*, 335 U.S. at 481

and n. 18, 69 S.Ct. at 221 and n. 18. Again, we are dealing with a phantasm.

But, even giving the majority the benefit of all the arguendos, its rule does not apply to a category of witness it believes was recognized in *Unites States v. Morgan*, 554 F.2d 31 (2d Cir. 1977) -- expert character witnesses. The *Morgan* panel, as the majority reads the opinion, "did not wish to foreclose the possibility that guilt-assuming hypothetical questions may be asked of the expert character witness, just as other expert witnesses, such as Internal Revenue Service agents in a tax fraud case, may be asked hypothetical questions based on facts offered to establish the defendant's guilt." At 539. Yet, if the danger to be avoided is a virus of illogic in the jury box, what is the difference to the jury

whether the question is asked of an expert or a lay witness? There is no difference, and so the proposed solution does not cure thoroughly even the imaginary problem the majority fears.

II.

The other prop supporting the majority position -- authority -- is not much stronger than the policy arguments discussed above. The main authority, of course, is *Morgan*, and the majority expends considerable energy decrying the alleged disregard of that case -- a decision the majority describes in the same sentence as both "clear" and "susceptible to misinterpretation." At 541. As set forth below, *Morgan* is not without ambiguity and there is another possible answer to the majority's question. "What does *Morgan* mean?" *Supra*, at 538. It bears mention,

however, that even if *Morgan* means exactly what the majority says it means, *Morgan* itself contemplated at least the possibility of change in light of experience under the Federal Rules of Evidence, which were brand new when *Morgan* was decided. *Morgan*, 554 F.2d at 34. Although the reexamination suggested in Morgan was in the direction of greater restriction, there is no reason to put a one-way ratchet on experience, and every reason to reexamine the logical basis for *Morgan* -- if *Morgan* is to be read as the majority reads it.

But again, that reading is not the only one possible. The character witness in *Morgan* testified, as Fed.R.Evid. 405(a) permits, as to both the defendant's reputation and the witness' own opinion of the defendant's honesty, integrity and

truthfulness. Opinion testimony was an innovation introduced by the Rule; prior practice had permitted only reputation testimony. On cross-examination, the witness was asked if his opinion (as distinguished from the defendant's reputation) would change if he knew that facts specified in the prosecutor's questions, comprising all or part of the crime charged, were true. 554 F.2d at 32. On appeal, the defendant argued that the questions were improper *inter alia* because they asked the jury to assume guilt. The panel majority in *Morgan* first distinguished cases involving reputation character testimony from the case then at hand, which dealt with opinion character testimony:

> "Here, the mater being pursued was the opinion of the witness concerning the defendant's

> character. When a witness is permitted to state his own opinion on a matter at issue, as he is now under Rule 405 of the Federal Rules of Evidence, some latitude in cross-examination must be allowed."

554 F.2d at 33. In order to measure how much latitude is appropriate, the *Morgan* majority then examined the pre-Federal Rules of Evidence practice with respect to experts, who are asked all the time to give opinions and answer hypothetical questions, on both direct and cross-examination, and concluded as follows:

> "We conclude, therefore, that the asking of the hypothetical question at issue herein, based as it was upon testimony already offered, was not prejudiciously improper so as to mandate reversal. It introduced nothing into the case which was not already before the jury."

Id. However, the opinion went on to say that because the Rule was new insofar as it permitted opinion testimony, the Court was reluctant to impose an evidentiary rule "which will inhibit full cross-examination of any such expert." 554 F.2d at 34. It was during this discussion that the panel majority first introduced the concept of "witnesses who may qualify as experts on traits of character." As I read the case, that does not necessarily refer literally to experts, whose testimony is governed in any event by the rules in Fed.R.Evid. Article VII, but rather to those who testify in the manner of experts -- *i.e.*, by expressing an opinion after they have been qualified to do so by evidence of their acquaintance with the defendant, something only experts had been permitted to do before

Fed.R.Evid. 405(a). Indeed, nothing in the facts of *Morgan* makes any other reference to experts necessary or relevant; *Morgan* did not involve expert testimony as that term is commonly understood and as the majority appears to use it here. Thus the statement in *Morgan* that a guilt-assuming question "should not be asked" of "non-expert character witnesses," 554 F.2d at 34, can be read to mean that the question should not be asked of reputation witnesses, as distinct from opinion witnesses.

Lest this reading of *Morgan* be dismissed as entirely idiosyncratic, I hasten to add that one of the circuit court decisions cited by the majority here in support of its position, *United States v. Polsinelli*, 649 F.2d 793 (10th Cir. 1981) reads *Morgan* precisely that way, to draw a distinction

between witnesses who testify in the manner of experts to personal opinion, and those who testify as non-experts to reputation, as follows:

> "Stated differently, we are not here concerned with the situation faced by the Second Circuit in *United States v. Morgan*, discussed *supra*, namely cross-examination of a so-called 'expert' character witness who has testified, on direct examination, as to his personal opinion of the defendant's character. In our case the so-called 'non-expert' character witnesses only testified as to Polsinelli's community reputation. We have now held that the Government's cross-examination of these 'non-expert' character witnesses was improper and, under the circumstances, prejudicial. In thus holding, we do not intend to imply that such cross-examination would have been proper had the

> character witnesses expressed their personal opinion of Polsinelli's character. Resolution of that particular matter must await a different fact situation."

Polsinelli, 649 F.2d at 799. To be sure, the panel in *Polsinelli*, while conceding that the issue was not before it, then went on--indictum--to express opposition to such a question posed to an opinion witness.

It bears mention also that in *Lopez v. Smith*, 515 F.Supp. 753, 756 (S.D.N.Y. 1981), Judge Weinfeld wrote that when a character witness testified to opinion, "it was not error to allow the attempt to impeach his opinion" with a guilt-assuming hypothetical question; his authority for that proposition was a "*cf.*" citation to *Morgan*. Id. n. 13.

Of the three cases the majority cites as having "correctly" read *Morgan* to prohibit

the question at issue here when addressed to a "non-expert," *supra* at 539, two fail to live up to that billing: *Polsinelli*, as set forth above, did not read *Morgan* to bar the question at issue when asked of an opinion character witness; *United States v. McGuire*, 744 F.2d 1197, 1204-05 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004, 105 S.Ct. 1866, 85 L.Ed.2d 159 (1985), cited *Morgan* and *Polsinelli* for the general proposition that questions to character witnesses which assume guilt of the charge on trial were improper, while pointing out that the question at issue in that case was of a different sort. Only *United States v. Williams*, 738 F.2d 172, 177 (7th Cir. 1984) focused on the distinction between reputation and opinion witnesses and found "no reason to treat reputation and opinion witnesses differently in this

regard." 738 F.2d at 177. Notably, *Williams* did not rely on *Morgan* in reaching that conclusion but described *Morgan* simply as follows: "(allowing conclusory cross-examination of expert character witness, but, in dictum, disapproving similar questioning of a non-expert character witness)." The majority tells us that "every circuit to have considered the issue, except the District of Columbia Circuit ... has agreed that guilt-assuming hypothetical questions should not be asked of character witnesses." *Supra*, at 539. That is literally true, but the impression it creates--of widespread support for the majority's position as to opinion witnesses--seems extravagant in view of what those cases actually considered. Of the six cases cited, each from a different circuit,

only *Williams* supports the rule the majority would impose.

The majority dispatches in a footnote *United States v. White*, 887 F.2d 267, 274-75 (D.C. Cir. 1989), which holds that a question of the sort at issue here to an opinion character witness is entirely permissible. That decision, we are told, relied on cases that do not support the proposition for which they are cited, *supra* at 539. n. 4, but that conclusion is itself questionable for two reasons. First, *White* cited three cases: *Polsinelli*, *supra*, which read *Morgan* as I do to suggest a distinction between opinion ("expert") and reputation ("non-expert") character witnesses: *United States v. Palmere*, 578 F.2d 105 (5th Cir. 1978) (*per curiam*), *cert. denied*, 439 U.S. 1118, 99 S.Ct. 1026, 59 L.Ed.2d 77 (1979), which

reiterated the holding in *United States v. Candelaria-Gonzalez*, 547 F.2d 291 (5th Cir. 1977) that guilt-assuming questions to *reputation* witnesses are impermissible; and *Morgan* itself. For the reasons set forth above, it is not unreasonable to read those cases as supporting a distinction between opinion and reputation character witnesses, such that the question challenged here would be permissible for the one and not for the other. Second, the majority's dismissal of *White* seems too casual also because that case does not simply cite authority; it is authority.

III.

A.

Anyone who reads *Morgan* literally to distinguish between lay and expert character witnesses must then consider who would

qualify as an expert on the character of his fellow beings--a topic ripe with possibilities, none of them attractive. The majority seems to suggest, hesitantly but assumptively, the candidacy of psychiatrists as experts on character. *Supra*, at 539. The assumption seems characteristic of the faith our age reposes in science in general and psychiatry in particular; the hesitation is entirely warranted. To assume that psychiatrists, because they understand more than most people about certain forces that govern human behavior, are therefore experts in human character, is sublimely logical, but quite wrong--rather like assuming that because Albert Einstein understood more than Ted Williams about the laws of physics that govern the path of a moving sphere, he must also have been a better hitter. Psychia-

trists, as psychiatrists should be the first to concede, are experts in pathology, not in morality. They are limited by their discipline to recognized patterns in mental illness. *See, e.g.*, American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (Third Edition--Revised), p. xxix (1987 ed.) (hereinafter "DSM-III-R").[3] Yet we have all seen

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[3] "**CAUTIONARY STATEMENT** .... The purpose of DSM-III-R is to provide clear descriptions of diagnostic categories in order to enable clinicians and investigators to diagnose, communicate about, study and treat the various mental disorders. It is to be understood that inclusion here, for clinical and research purposes, of a diagnostic category such as Pathological Gambling or Pedophilia does not imply that the condition meets legal or other nonmedical criteria for what constitutes mental disease, mental disorder, or mental disability. The clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly

(continued...)

criminals who are glowing portraits of mental health, and saints who bristle with neuroses.

A stock swindler or a tax cheat may act based on a recognized personality disorder, *e.g.* DSM-III-R 301.70, or he may act based on simple greed and the belief that he can get away with it. Psychiatrists may be able to detect mental conditions that generate criminality, and thus would qualify as experts to testify about such conditions. But that does not make them experts on human behavior.

That is not to say there will be any shortage of candidates for the title of expert. Among the first probably would be

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[3](...continued)
relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination, and competency."

the clergy, who deal regularly with sin and virtue, good and evil, and the like. Of course, once we recognize the clergy as experts in character, we would have to avoid offense to the First Amendment, *cf.*, *Welsh v. United States*, 398 U.S. 333, 338, 90 S.Ct. 1792, 1795, 26 L.Ed.2d 308 (1970), by recognizing also a Coxey's army of lay moralists, ethicists and pretty much anyone else willing to set up a booth on the fair ground--including, as a matter of professional courtesy if nothing else, judges. All in all, this is not an appetizing prospect.

The simple truth is that the notion of expert character testimony, although it has been bandied about in the literature for some time, *compare*, *e.g.*, Curran, "Expert Psychiatric Evidence of Personality Traits,"

103 U.Pa.L.Rev. 999, 1013 (1955) (endorsing such evidence) *with*, Falknor and Steffen, "Evidence of Character: From the Crucible of the Community to the Couch of the Psychiatrist," 102 U.Pa.L.Rev. 908, 994 (1954) (criticizing such evidence), is one of those ideas whose time has not yet come, and with common sense and a modicum of luck it never will. Rule 702 of the Federal Rules of Evidence provides that, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert ... may testify thereto." As this Court wrote in *Andrews v. Metro North Commuter R. Co.*, 882 F.2d 705, 708 (2d Cir. 1989), "For an expert's testimony to be admissible under this Rule, however, it must be directed to

matters within the witness' scientific, technical, or specialized knowledge and not to lay matters which a jury is capable of understanding and deciding without the expert's help." Character is a subject on which jurors do not need and therefore should not get expert guidance. *United States v. Webb*, 625 F.2d 709, 710-11 (5th Cir. 1980). To suggest otherwise is at best unhelpful.

B.

Finally, while fashioning an absolute rule about what sort of cross-examination should be permitted at a trial, the majority itself appears to have disregarded a bit of guidance on the wisdom of such appellate rule-making that the Supreme Court provided in *Michelson*, *supra*, albeit in the form of dictum. That case and its history are instructive. The case originated in this

Circuit, and appears to have been heard by the Supreme Court at least in part at the request of the author of the Circuit opinion. That author, Judge Clark, urged that the rule permitting a reputation character witness to be cross-examined about other bad acts of the accused in order to test the witness' grounds for knowledge, should be changed. He doubted that trial judges could fashion effective instructions:

> "Because, as Wigmore says, the jury almost surely cannot comprehend the judge's limiting instruction, the writer of this opinion wishes that the United States Supreme Court would tell us to follow what appears to be the Illinois rule, i.e., that such questions are improper unless they relate to offenses similar to those for which the defendant is on trial."

United States v. Michelson, 165 F.2d 732, 735 n. 11 (2d Cir. 1948). The Supreme Court took the case, but left the prevailing rule undisturbed. It wrote that despite criticism, the law as it stood "has proved a workable even if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial court." 835 U.S. at 486, 69 S.Ct. at 223. As the majority opinion illustrates, those discretionary controls worked well here; lest anyone miss the point, the trial court made the obvious explicit by instructing the jury specifically on the limited purpose for which the evidence at issue was received. At 538, 541; App. 1422, 1433, 1461. Those discretionary controls should not be abandoned in favor of an inflexible rule. Justice Frankfurter,

concurring in *Michelson*, put the matter even more forcefully:

> "Despite the fact that my feelings run in the general direction of the views expressed by MR. JUSTICE RUTLEDGE in his dissent, I join the Court's opinion. I do so because I believe it to be unprofitable, on balance, for appellate courts to formulate rigid rules for the exclusion of evidence in courts of law that outside them would not be regarded as clearly irrelevant in the determination of issues. For well-understood reasons this Court's occasional ventures in formulating such rules hardly encourages confidence in denying to the federal trial courts a power of control over the allowable scope of cross-examination possessed by trial judges in practically all State courts. After all, such uniformity of rule in the conduct of trials is the crystallization of experience even when due

> allowance is made for the force of limitation. To reject such an impressive body of experience would imply a more dependable wisdom in a matter of this sort than I can claim.
>
> "To leave the District Courts of the United States the discretion given to them by this decision presupposes a high standard of professional competence, good sense, fairness and courage on the part of the federal district judges. If the United States District Courts are not manned by judges of such qualities, appellate review, no matter how stringent, can do very little to make up for the lack of them."

335 U.S. at 488-89, 69 S.Ct. at 224-25.

For the foregoing reasons, as to part I of the majority opinion, I concur only in the judgment.

Appendix B

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23 day of August one thousand nine hundred and ninety

Present: HON. JON. O. NEWMAN,
HON. GEORGE C. PRATT,
HON. MICHAEL B. MUKASEY, DJ*

CIRCUIT JUDGES,

UNITED STATES OF AMERICA ,	)	
	)	
Appellee,	)	
	)	Docket
v.	)	No.
	)	89-1228,
MICHAEL P. OSHATZ and LEONARD A. MESSINGER,	)	89-1375
	)	
	)	
Defendants-Appellants.	)	
	)	

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is hereby ordered, adjudged and decreed that the judgment of said District Court be and it

hereby is affirmed in accordance with the opinion of this court.

Elaine B. Goldsmith,
Clerk

By: Edward J. Guardaro,
Deputy Clerk

*Of the District Court for the Southern District of New York, sitting by designation.

ISSUED AS MANDATE.

Oct. 24, 1990

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNTIED STATES OF AMERICA,

-against-

MICHAEL P. OSHATZ and
LEONARD A. MESSINGER,

Defendants.

O P I N I O N

87 Cr. 1000
(RWS)

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After an eleven week trial and five hours of deliberations, a jury convicted defendant Michael P. Oshatz ("Oshatz") on one count of conspiracy and fourteen counts of tax fraud and defendant Leonard Messinger ("Messinger") on one count of conspiracy and nine counts of tax fraud. Both defendants have moved under Rule 33, Fed. R. Crim. P., for an order granting a new trial or permitting defense counsel to interview jurors regarding their deliberations, claiming that the jurors failed to observe the court's instruction not to deliberate

before the close of the case and that the jurors rushed their deliberations to meet their vacation and employment obligations. For the reasons set forth below, the motion is denied.

The Facts

The defense retained Neil Tipograph ("Tipograph"), a Certified Public Accountant, to review documents to be offered at trial, and Tipograph appeared in the courtroom at or near the defense table on various occasions during the trial.

Several months after the trial ended, a woman approached Tipograph while he was standing in a parking lot in Manhattan and introduced herself as a member of the jury that had convicted Oshatz and Messinger. In his affidavit, Tipograph describes this encounter as follows:

4. Apparently recognizing me as having been connected to the defense, the juror volunteered to me that after Edward Markowitz ["Markowitz"] [the promoter of the fraudulent tax shelters that gave rise to the indictment and the government's principal fact witness] had testified, all the jurors' minds were made up and the jury believed the defendants were guilty.

5. She added that all the jurors had been very annoyed about the length of the trial since they either had vacations which were planned or had to get back to work. They therefore deliberated quickly in order to get it over with.

6. The juror, who expressed regret to me about the jury's actions in that regard, stated that she went along because she had not wanted to "rock the boat."

Tipograph Aff. at 1-2.

Oshatz and Messinger contend that Tipograph's affidavit requires a new trial or an investigation for two reasons. First, by making up their minds after Markowitz's testimony, the jurors may have violated the court's instruction that they not discuss the evidence until the close of the case,

including the defendants' summations. Second, to the extent the jurors rushed their deliberations to meet vacation and work obligations, they may have been responding to improper external pressure from spouses or employers.

Post-Verdict Investigation of Jurors

Rule 606(b) of the Federal Rules of Evidence provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Although Rule 606(b) recognizes that certain circumstances warrant post-verdict scrutiny of a jury's conduct, courts generally are reluctant "to haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences." United States v. Moon, 718 F.2d 1210, 1234 (2d Cir. 1983), cert. denied, 466 U.S. 971 (1984). The Second Circuit recently identified the important policies underlying this reluctance:

> [p]ost-verdict inquiries may lead to evil consequences: subjecting juries to harassment, inhibiting juryroom deliberation, burdening courts with meritless applications, increasing temptation for jury tampering and creating uncertainty in jury verdicts.

United States v. Ianniello, 866 F.2d 540, 543 (2d Cir. 1989). Accordingly, courts will hold post-verdict hearings only when the defendant presents "clear, strong, sub-

stantial and incontrovertible evidence . . . that a specific, nonspeculative impropriety has occurred . . . ." Moon, 718 F.2d at 1234; see also King v. United States, 576 F.2d 432, 438 (2d Cir.), cert. denied, 439 U.S. 850 (1978). Courts will not grant a defendant a post-verdict investigation "merely to conduct a fishing expedition." United States v. Moten, 582 F.2d 654, 667 (2d Cir. 1978).

Applying that strict standard here, Tipograph's affidavit contains insufficient evidence to warrant a post-verdict investigation. Although the juror told Tipograph that the jurors had made up their minds after Markowitz's testimony, she did not say whether the jurors in fact deliberated following Markowitz's testimony or at any other time prior to the close of

the case. Her statement to Tipograph hardly constitutes "clear, strong, substantial and incontrovertible evidence" that the jurors deliberated prematurely. Even if they did, however, that would not necessarily require further investigation -- the defendants cite no federal case in which premature deliberations required a new trial.

Moreover, Tipograph's affidavit contains little evidence that external influence improperly was brought to bear on the jury. Read most favorably, the affidavit constitutes the first link in a speculative chain of reasoning requiring this court to conclude that a spouse or employer told one of the jurors to rush deliberations so he or she could start vacation or return to work sooner, that the juror revealed this threat to the other members of the jury, and that

they in turn -- in violation of their oaths as jurors -- agreed to hasten their deliberations to accommodate this individual's needs. However, this reasoning is far too speculative to meet the strict standard the Second Circuit has articulated for ordering a post-verdict inquiry.

Moreover, a more reasonable interpretation of the juror's remarks indicates that they bear upon a "matter or statement occurring during the course of the jury's deliberations" or "concern[] the juror's mental processes." Fed. R. Evid. 606(b). However, Rule 606(b) bars absolutely post-verdict consideration of these matters.

Conclusion

For the reasons set forth above, the defendants' motion for a new trial or a post-verdict investigation is denied.

It is so ordered.

New York, N.Y.
June 13, 1989.

ROBERT W. SWEET
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	
- against -	NOTICE OF MOTION
MICHAEL P. OSHATZ, et al.,	87 Cr. 1000 (RWS)
Defendants.	

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of MARK M. BAKER, ESQ., duly sworn to on the 18th day of May, 1989, the exhibit and memorandum of law appended thereto, and upon all proceedings previously had, the undersigned will move this court, before the Hon. Robert W. Sweet, at the Courthouse, Foley Square, New York, New York, at a date and time to be fixed by the court, for an order pursuant to Fed.R.Cr.P. 33, granting a new trial herein, and for such

other and further relief as to the Court seems just and proper.

Dated: New York, New York
May 18, 1989

Yours, etc.

SLOTNICK & BAKER
Attorneys for Defendant
Michael P. Oshatz
225 Broadway, Suite 2100
New York, New York 10007
(212) 964-3200

By: _____
MARK M. BAKER

TO: HON. ROBERT W. SWEET

CLERK OF THE COURT

ROBERT CLEARY, ESQ.
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	AFFIDAVIT
- against -	87 Cr. 1000 (RWS)
MICHAEL P. OSHATZ, et al.,	
Defendants.	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MARK M. BAKER, being duly sworn, deposes and makes the following statement.

1. I am an attorney at law, duly admitted to practice in this Court, and a member of the firm of Slotnick & Baker, attorneys for defendant Michael P. Oshatz.

2. This affidavit is submitted in support of defendant's motion, dated May 18, 1989, whereby an order is sought granting a new trial pursuant to Fed.R.Cr.P. 33 upon a

requested hearing or, in the alternative, granting leave to the defense to interview members of the jury herein which returned the verdict of guilty.

3. As can be seen from a review of the annexed affidavit of Neil Tipograph, dated May 18, 1989 (Exhibit A), one of the jurors in this case, in a wholly unsolicited manner, approached Mr. Tipograph, whom she had recognized from the trial, and told him of her concerns about the verdict.

4. Firstly, the juror indicated that the jury had virtually made up its mind as to defendant's guilt following the testimony of witness Edward A. Markowitz (thereby strongly implying that premature deliberations had taken place, in disregard of the Court's order, prior to summations and the Court's charge).

5. Secondly, the juror stated that the unduly hasty verdict herein, considering the complexity and length of the case, was owing to the fact that the jurors were annoyed about having to sit so long. As explained, they therefore quickly decided the case in order to keep their vacation plans intact and meet their work obligations. This particular juror went along only because she did not want to "rock the boat".

6. Although it is inappropriate to delve into matters that were intrinsic to the jury room in the course of its deliberations, for the reasons stated in the accompanying memorandum of law the potential facts to which this particular juror's misgivings give rise go well beyond mere internal jury issues.

7. Accordingly, to the extent that the jury herein deliberated before the defense's summation was heard and prior to the Court's instructions, or the jury was improperly influenced through outside family and employer pressures to expedite its deliberations, defendant has suffered egregious and unduly prejudicial harm.

8. In this regard, only a hearing on this motion, or, at the very least, the ability to interview the jurors, will afford all parties concerned an opportunity to elucidate the controlling facts.

WHEREFORE, for all the above-stated reasons, and for those stated in the accompanying memorandum of law, the motion should be granted and a hearing ordered; in the alternative, the defense should be accorded the right to interview the jurors.

Upon the establishment of such facts demonstrating that improper juror conduct unduly prejudiced the defendant's case, a new trial should be ordered.

Dated: New York, New York
May 18, 1989

MARK M. BAKER

Sworn to before me this
18th day of May, 1989.

Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	AFFIDAVIT
- against -	)	87 Cr. 1000 (RWS)
MICHAEL P. OSHATZ, et al.,	)	
Defendants.	)	

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

NEIL TIPOGRAPH, being duly sworn, deposes and makes the following statement.

1. I am a Certified Public Accountant who had been hired by the defense in this case to review documents to be offered at trial.

2. In such capacity, I appeared in the courtroom on many occasions either at the defense table or in close proximity thereto, in full view of the jury.

3. Recently, as I was standing in a parking lot in Manhattan, I was approached by an individual who introduced herself as a member of the jury herein.

4. Apparently recognizing me as having been connected to the defense, the juror volunteered to me that after Edward Markowitz had testified, all the jurors' minds were made up and the jury then believed the defendants were guilty.

5. She added that all the jurors had been very annoyed about the length of the trial since they either had vacations which were planned or had to get back to work. They therefore deliberated quickly in order to get it over with.

6. The juror, who expressed regret to me about the jury's actions in that regard,

stated that she went along because she had not wanted to "rock the boat".

Dated: New York, New York
May 18, 1989

NEIL TIPOGRAPH

Sworn to before me this
18th day of May, 1989.

Notary Public

Appendix D

89-1228

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-v.-

MICHAEL P. OSHATZ and LEONARD A. MESSINGER,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

==========

PETITION OF APPELLANT MICHAEL P. OSHATZ
FOR REHEARING AND SUGGESTION FOR REHEARING
EN BANC

==========

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PRELIMINARY STATEMENT

Appellant Michael P. Oshatz respectfully petitions for rehearing, and suggests rehearing en banc, of the decision of a panel of this Court (Newman and Pratt, Circuit Judges, and Mukasey, District Judge, sitting by designation), affirming Oshatz's convictions on charges that he participated in a fraudulent tax shelter scheme. United States v. Oshatz, Dkt. No. 89-1228, slip op. 6149 (2d Cir. Aug. 23, 1990). The panel reached this result notwithstanding the conclusion in the majority opinion that the government had solicited and obtained several evidentiary rulings that flouted prior decisions of this Court. Because the panel's decision improperly dilutes the binding effect of Second Circuit precedent, we urge

the Court to reconsider the panel's holding and reverse appellant's convictions.

STATEMENT OF THE CASE

Edward Markowitz, the self-confessed mastermind of this and other fraudulent tax shelter schemes, testified at trial as the government's key witness. The defense did not dispute that Markowitz engaged in fraudulent trading; the contested issue at trial was whether Oshatz, a prominent New York tax attorney, and his partner and co-defendant, Leonard Messinger, were aware of Markowitz's wrongful activities.

Between 1979 and 1981, at Markowitz's request, Oshatz and his law firm helped prepare the legal papers necessary to establish a series of affiliated partnerships known collectively as "The Monetary Group."

(Tr. 281-94, 406-10, 451-52, 474).[1] The offering materials all provided that the partnerships' investment transactions would be effected to generate economic gain and would involve substantial market risk. (E.g., Tr. 444-46, 468-70).

Markowitz was responsible for establishing the necessary trading relationships, hiring employees, and running the day-to-day operations of the partnerships out of his office in Washington, D.C. (Tr. 287, 297-99, 407, 452). Under Markowitz's stewardship, the Monetary Group partnerships engaged primarily in two types of complicated, tax-oriented securities transactions on behalf of their limited

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[1] "Tr." refers to pages in the trial transcript; "GX" refers to government exhibits at trial; "A" refers to pages in Appellants' Joint Appendix on this appeal.

partner investors. Initially, Markowitz had the partnerships enter into "straddle transactions"; prior to a change in the tax laws in the spring of 1981, straddles provided investors with a legitimate method by which to shelter income. (Tr. 3749-53). A "straddle" involved the simultaneous establishment of "long" and "short" positions in similar commodities or securities. As the market moved, there would be a potential loss on either the long or the short position. In order to realize a deductible loss, the losing position would be liquidated prior to the end of the tax year. The remaining "leg" of the straddle would not be liquidated until the beginning of the following year, generating a taxable gain in the later year. The tax effect of such a "straddle" was to

defer taxable income from one year to the next. (Tr. 330-33, 2924).

Real tax straddles involved some market risk, because the differential or "spread" between the long and short positions would constantly move, precluding any guarantee that the gain on the second leg would precisely match the loss on the initial leg. (Tr. 118, 340- 41). However, in order to avoid this risk and yet obtain four-to-one write-offs for his investors, Markowitz and his traders prepared backdated trading tickets and confirmations reflecting trades that never took place. (Tr. 116-17, 317-18, 343). The trading documents that Markowitz generated appeared on their face to reflect real transactions with market risk. (Tr. 119, 343).

After a change in the tax laws effectively eliminated straddles as a tax shelter device, Markowitz, through one of his traders, devised yet another riskless and fraudulent method by which to achieve tax losses for the limited partnerships -- i.e., through repurchase or "repo" agreements, used to finance the purchase of Treasury bills. In essence, a repo agreement is a collateralized loan, in which the collateral consists of the security being purchased in the transaction. In a "repo to maturity" agreement, the interest on the loan is fixed until the maturity date of the T-bill; since the interest expense and income are known at the outset, there can be no risk of loss. In contrast, in an "open" repo agreement, the interest on the loan is permitted to float according to the prevailing market rate,

carrying with it the potential for profit or loss, and therefore entitling the investor to an interest expense deduction. (Tr. 2080-83).

In order to generate losses but eliminate market risk, Markowitz and his traders entered into repo agreements that were falsely characterized on paper as "open" repos; in fact, through secret side deals with several trading partners, agreements were reached whereby the purportedly "open" interest rates would not change and the T-bills would be held to maturity, thereby eliminating market risk. (Tr. 603, 1947- 63, 2104-12).

The government contended that Oshatz and Messinger, who invested in various partnerships that obtained losses through trades with the Monetary Group (e.g., Tr.

362-65, 5366-67), were aware that Markowitz was generating losses through prearranged and fictitious trades.[2] Following an eleven-week trial before the Honorable Robert W. Sweet, the jury returned guilty verdicts on all counts. Oshatz was sentenced on Count One to a 40-month term of imprisonment, and was placed on three years' probation on the remaining counts.

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[2] Oshatz and Messinger were charged in a 16-count indictment, 87 Cr. 11000. Count One charged that the two attorneys conspired to defraud the United States and violate the Internal Revenue Code, in violation of 18 U.S.C. § 371. Counts Two through Thirteen charged that in 1981 and 1982, Oshatz (and, as to some counts, Messinger) aided and assisted in the filing of false tax returns of certain limited partnerships, in violation of 26 U.S.C. § 7206(2). Counts Fourteen and Fifteen charged That Oshatz filed false personal income tax returns for 1980 and 1981, in violation of 26 U.S.C. § 7206(1); Count Six charged Messinger with a similar offense.

On appeal to this Court, Oshatz claimed that a series of erroneous evidentiary rulings by the trial court compromised every aspect of his defense, thereby depriving him of a fair trial: Appellant's right to confront the key witness against him (Markowitz) was improperly limited as a result of the trial court's mistaken assumption that Fed. R. Evid. 608(b) strictly prohibited the introduction of documentary evidence on cross-examination; appellant was compelled to defend against four unfairly prejudicial and equivocal uncharged acts that bore little resemblance to the activities alleged in the indictment; appellant's attempt to convince the jury of his good character was unfairly neutralized by the government through a series of questions -- of the kind expressly condemned by this Court

in United States v. Morgan, 554 F.2d 31, 34 (2d Cir.), cert. denied, 434 U.S. 965 (1977) -- that improperly assumed appellant's guilt; and for more than a week at the end of its case, the government was permitted to display an unsubstantiated and unreliable summary chart, admitted without foundation by the District Court, contrary to this Court's mandate in United States v. Citron, 783 F.2d 307, 316 (2d Cir. 1986).

Oral argument on this appeal was held on March 19, 1990. Under pointed questioning by the panel, the Assistant United States Attorney who tried the case was constrained to concede that, in hindsight, he should not have pressed for several of the evidentiary rulings challenged on appeal.

On August 23, 1990, the panel affirmed appellant's convictions, with Judge Mukasey

issuing a concurring opinion in which he took issue with only that portion of the majority's opinion that addressed the examination of character witnesses. On that point, the majority concluded that this Court's earlier decision in Morgan means precisely what the defense had urged in the trial court and on appeal: i.e., the government is prohibited from asking guilt-assuming hypothetical prohibited from asking guilt-assuming hypothetical questions of lay character witnesses, since such cross-examination "creates too great a risk of impairing the presumption of innocence. "Oshatz, slip op. at 6160.[3] After concluding that the Morgan prohibition is "quite clear,"

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[3] In his concurrence, Judge Mukasey concluded that Morgan's prohibition should not apply to opinion (as opposed to reputation) witnesses. Oshatz, slip op. at 6177.

Oshatz, slip op. at 6159, the majority nevertheless declined to reverse, reasoning that "the Government was entitled to urge an interpretation of Morgan favorable to its position, and the District Judge cannot be faulted for misreading Morgan as he did." Oshatz, slip op. at 6164.

With respect to the introduction of the government's summary chart, the panel again cited errors by the government and the trial court: ignoring at least two prior decisions of this Court, the government failed to produce the underlying computer programs in advance of trial and the trial court admitted the chart without first determining the accuracy of the figures on the exhibit. Oshatz, slip op. at 6169. Nevertheless, because the trial court had permitted the government to amend those figures shown to be

inaccurate through defense cross-examination, the panel again declined to reverse the convictions. Id.

With respect to the trial court's exclusion of documents offered by the defense during the cross-examination of Markowitz, the panel concluded that Judge Sweet had acted within his discretion in excluding the proffered proof. However, as a fair reading of the record reveals, and as one member of the panel noted at oral argument, the trial court did not purport to exclude the documents under Fed. R. Evid. 403; rather, at the government's persistent urging, the trial court rested its ruling on the mistaken belief that it was without discretion to admit the exhibits.

Finally, in upholding the admission of the similar act proof, the panel simply

ignored the government's confession of error as to one aspect of the proof, and then viewed each of the remaining three acts in isolation, rather than assessing the unfair and devastating impact of proof as to four sets of equivocal uncharged acts.

ARGUMENT
POINT ONE

THE GOVERNMENT' S DELIBERATE DEFIANCE OF THE MANDATE IN MORGAN SHOULD NOT BE COUNTENANCED BY THIS COURT

In United States v. Morgan, 554 F.2d at 34, this Court stated in no uncertain terms that hypothetical questions that assume the guilt of the accused "should not be asked" of "non-expert character witnesses" called by the defense. Notwithstanding Morgan and a long line of like decisions in other

circuits[4] -- including several in which

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[4] At the time of trial, every federal Court of Appeals to have addressed the issue had condemned the use of hypothetical questions that require a character witness to assume the guilt of the accused. See United States v. Page, 808 F.2d 723, 731 (10th Cir.), cert. denied, 482 U.S. 918 (1987); United States v. McGuire, 744 F.2d 1197, 1204 (6th Cir. 1984), cert. denied, 471 U.S. 1004 (1985); United States v. Williams, 1738 F.2d 172, 177 (7th Cir. 1984); United States v. James, 728 F.2d 465, 467-68 (10th Cir.), cert. denied, 469 U.S. 826 (1984); United States v. Primrose, 718 F.2d 1484, 1493 (10th Cir. 1983), cert. denied, 466 U.S. 974 (1984); United States v. Polsinelli, 649 F.2d 793, 797 (10th Cir. 1981); United States v. Palmere, 578 F.2d 105, 107 (5th Cir. 1978), cert. denied, 439 U.S. 1118 (1979); United States v. Candelaria-Gonzalez, 547 F.2d 291, 294-95 (5th Cir. 1977). See also United States v.Barta, 888 F.2d 1220, 1224-24 (8th Cir. 1989), and United States v. Siers, 873 F.2d 747, 749-50 (4th Cir. 1989) (decided after Oshats trial). The only contrary appellate decision, United States v. White, 887 F.2d 267, 274-75 (D.C. Cir. 1989), was decided after the trial in this case and thus was not relied upon by the government or the court below.

convictions were reversed[5] -- the government in this case pressed for and obtained a ruling permitting such questions. At oral argument on this appeal, the prosecutor who tried the case conceded that "it was a mistake on our part to push that (issue) the way we did."[6] Nevertheless, after observing that "Morgan is quite clear in its condemnation of guilt assuming hypothetical questions asked of lay character witnesses,"Oshatz, slip op. at 6159, and that its "forceful declaration" should not have been "disregarded" in this case, Id. at 6163,

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[5] United States v. Polsinelli, supra; United States v. Candelaria-Gonzalez, supra.

[6] A transcript of the oral argument has not been prepared. However, appellant's counsel, who argued the case, has carefully reviewed the Court's tape-recording of the oral argument, which was made available by the Clerk of the Court.

the panel affirmed appellant's convictions -- albeit with an acknowledgment that "(w]hat we have just said might be expected to lead to a reversal in this case . . . ." Id.

The factors cited by the panel in affirming the convictions (id. at 6164) neither justify nor mitigate the government's improper erosion of the presumption of innocence, especially in the face of Morgan. The fact that another circuit subsequently rendered an aberrational opinion permitting such questioning did[7] not retroactively provide the prosecutor with the right to evade the clear mandate of controlling authority of this Court -- particularly where the concurring opinion in Morgan leaves no

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[7] United States v. White, 887 F.2d 274-75, discussed at note 4, supra.

room whatsoever for misinterpretation.[8] Nor does the fact that the trial court ultimately accepted the government's position lessen the severity of the error, which was plainly invited by the government: Judge Sweet acknowledged his difficulty with the issue (A 1375) and "hope[d] that (the government] think(s) 'I am right." (A 1373). Thus, this was not a case in which the prosecutor, in the heat of trial, inadvertently stepped over the line, as sometimes happens in counsels' summations. Cf. United States v. Modica, 663 F.2d 1173 (2d Cir. 1981), cert. denied, 456 U.S. 989 (1982). Rather, here the government

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[8] In his concurring opinion, Judge Mansfield declared: "[T)he questions put by the prosecutor to the character witnesses were improper because they asked the jury to assume the defendant to be guilty of the very charge on trial . . . ." 554 F.2d at 34 (Mansfield, J., concurring).

took a calculated risk in urging the trial court to depart from Morgan and its progeny in other circuits. In these circumstances, the panel's failure to reverse will have the unintended and untoward effect of affording the government "a license to disregard procedural constraints announced by an appellate court." Oshatz, slip op. at 6163. This Court should not countenance the government's deliberate defiance of its prior decision. For this reason, and in light of the resulting prejudice,[9] appellant's

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[9] The trial court's limiting instruction did not adequately mitigate the unfair prejudice. First, the jury was not advised of the supposedly limited purpose of the inquiry until more than three weeks after appellant's character witness left the stand (see A 1421-22, 1612) -- long after the damage had been done. Moreover, in order to avoid the government's repeated incantation of its presumption of guilt, appellant chose not to call a series of additional

(continued...)

convictions should be reversed.

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[9](...continued)
character witnesses who would otherwise have testified in his defense (see A 1372, 1403) -- thereby foregoing a major part of the defense case. Finally, the panel applied an incorrect standard of harmless error (see Oshatz, slip op. at 6163); since the ruling impaired the constitutionally mandated presumption of innocence, reversal is warranted unless the error can be characterized as harmless beyond a reasonable doubt. See United States v. Polsinelli, 649 F.2d at 796-97. Measured by that standard, and in light of the series of other errors invited by the government, appellant's conviction cannot stand.

POINT TWO

THE ADMISSION OF THE GOVERNMENT'S SUMMARY CHART VIOLATED THIS COURT'S DECISIONS IN DIOGUARDI AND CITRON

As its final witness, the government called an agent of the Internal Revenue Service, through whom the government introduced a chart (GX 3202) that purported to summarize the gross trading losses and expenses for each of nine Markowitz-related entities. As calculated by the witness, the sums were huge[10] and unquestionably had an impact on the jury. However, as amply demonstrated by the defense, the chart was entirely unreliable and should not have been admitted as a summary of the evidence under Fed. R. Evid. 1006. Indeed, the IRS agent

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[10] When first introduced, the chart listed the total gross tax loss figure as about $1.823 billion (the corresponding gains were not reflected). (See A 85, 1037).

acknowledged that, despite the mandate of Rule 1006, he had performed the calculations underlying the figures on the chart without creating and maintaining an "audit trail" by which the defense could trace and test the accuracy of his figures. (A 960-68).

As the panel acknowledged (Oshatz, slip op. at 6169), the admission of the summary chart ran afoul of several decisions of this Court. In United States v. Dioguardi, 428 F.2d 1033 (2d Cir.), cert. denied, 400 U.S. 825 (1970), this Court declared:

> It is quite incomprehensible that the prosecution should tender a witness to state the results of a computer's operations without having the program available for defense scrutiny and use on cross-examination if desired. We place the Government on the clearest possible notice

> of its obligation to do this and also of the great desirability of making the program and other materials needed for cross-examination of computer witnesses, such as flow-charts used in the preparation of programs, available to the defense a reasonable time before trial.

Id. at 1038 (emphasis added). Months before trial, defense counsel, citing Dioguardi, had requested pretrial production of materials underlying any computerized summaries or data compilations to be used by the government.[11] Despite this request, and the trial court's endorsement of the defense proposal (see 9/30/88 Tr. 13, 47), the government simply ignored Dioguardi and first produced its summary of charts and computer-run

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[11] See Addendum to Reply Brief of Appellant Michael Oshatz, at p.7 n.*.

compilations, without any backup, several days before the witness was called to the stand. (See A 866, 879-80, 1094). After ten days of his testimony, the conclusion of cross-examination, and numerous changes and objections to the chart, the government furnished what purported to be a reconstructed data trail, created by the witness during trial. (See A 1321). It is difficult to imagine a clearer violation of Dioguardi.

Compounding this problem, the government further flouted this Court's pronouncements and urged the trial court to admit the chart without first making the requisite foundational showing. This Court has consistently held that "[s]ummary charts should not be admitted unless a proper foundation is established connecting the

numbers on the chart with the underlying evidence." United States v. Citron, 783 F.2d at 316 (reversing convictions for tax violations where summary chart was admitted without proper foundation). Accord, United States v. Koskerides, 877 F.2d 1129, 1134 (2d Cir. 1989). As part of this foundational prerequisite, "[c]ourts have long required that district courts ascertain that summary charts 'fairly represent and summarize the evidence upon which they are based.'" United States v. Citron, 783 F.2d at 316 (emphasis added), quoting United States v. O'Connor, 237 F.2d 466, 475 (2d Cir. 1956). In this case, however, Judge Sweet admitted the chart without such a showing and improperly shifted the burden to the defense to demonstrate the

lack of a sufficient foundation.[12] (See A 985-86, 1149-50). Even after the defense cross-examination revealed numerous and (as the trial court acknowledged) "substantial errors" in the calculations (A 1339), the court refused to strike the government' s "tottering" chart. (A 1319). Instead, the court repeatedly invited the government to withdraw the exhibit, inquiring whether the prosecutor still wanted to "go forward . . . and take our chances" with the chart. (A 1233-34; see A 1237).

Once again, the government chose to disregard clear precedent and take its chances, and once again, the panel found

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12 See United States v. Johnson, 594 F.2d 1253, 1255 (9th Cir.), cert. denied, 444 U.S. 964 (1979) (opponent of proffered summary need not demonstrate absence of sufficient foundation).

error but declined to enforce the mandate of this Court's prior decisions. The panel reasoned that appellant suffered no prejudice as a result of the chart's admission, since the trial court permitted the government to correct the many mistakes uncovered during cross-examination by the defense.[13] Oshatz, slip op. at 6169-70. With due respect to the panel, this analysis misses the mark. First of all, it should not have fallen to the defense to identify for the government where its exhibit required corrections; given the government's inability to demonstrate the reliability of its calculations, the chart and its glaring figures should never have

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[13] Even the IRS agent was constrained to concede that approximately 45 percent of the original entries on GX 3202 were erroneous, and that some had been changed on two occasions. (A 1351-52).

been exposed to the jury. The chart was an extremely harm"[14] that unfairly prejudiced appellant before the "potent weapon for jury. Moreover, the government's persistent defiance of this Court's decisions warrants strong remedial action in the form of reversal. Unless this Court is content to render precatory opinions, its directives to prosecutors should be vigorously enforced.

POINT THREE

CONTRARY TO THE PANEL'S OPINION, THE TRIAL COURT DID NOT PURPORT TO EXERCISE ITS DISCRETION IN ERRONEOUSLY EXCLUDING CRITICAL DEFENSE EXHIBITS

During the direct examination of Edward Markowitz, the government elicited testimony that he was impoverished, having forfeited to the government all his assets

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[14] United States v. Conlin, 551 F.2d 534, 539 (2d Cir.), cert. denied, 434 U.S. 831 (1977).

and ill-gotten gains. (A 202-03). On cross examination, appellant sought to establish that Markowitz had secreted additional amounts of his criminal proceeds, had funnelled substantial sums to his relatives, and had struck a deal with the government in the hopes of minimizing the risk that he would have to relinquish his hidden assets. (See A 233-38). Remarkably, Markowitz claimed to have no recollection of transfers of huge sums of money to his various relatives -- even when confronted with a series of checks, signed by him, documenting these transactions. (E.g., A 254-55, 354-57, 365-67, 386, 389-90, 412-14).

The defense then sought to introduce the checks themselves; the government, in an objection that the prosecutor conceded at oral argument had been

"misguided," opposed the proof, claiming that it was "strictly forbidden" under Fed. R. Evid. 608(b), which bars the use of extrinsic evidence for the purpose of attacking the credibility of a witness. (A 235). In response, the defense cited a series of bases of admissibility: e.g., the government had "opened the door" to this evidence, see, e.g., United States v. Benedetto, 571 F.2d 1246, 1250 (2d Cir. 1978); the evidence was probative of Markowitz's motive to curry favor with the government, see e.g., United States v. James, 609 F.2d 36, 46 (2d Cir. 1979), cert. denied, 445 U.S. 905 (1980); and, in any event, the proof was not "extrinsic" within the meaning of Rule 608(b), since the documents could be authenticated and admitted through the cross-examined witness, see, e.g., Carter v.

Hewitt, 617 F.2d 961, 969- 71 (3d Cir. 1980). The government nevertheless maintained that Rule 608(b) posed an absolute bar to the admission of the defense exhibits, and persuaded the trial court that motive is a "subset" of credibility, which may not be proved by extrinsic evidence. (See A 383-84). Though questioning the "wisdom of the rule" as construed by the government (A 242), and confessing to having some "difficulty" with the "mystery of 608(b)" (A 240; see A 378), the trial court adopted the government's misstatement of the law, and on that basis precluded the proof.

On appeal, the panel summarily disposed of this issue, concluding that Judge Sweet had properly exercised his discretion in excluding the proof. Oshatz, slip op. at 6168-69. With due respect to the panel, the

record reveals otherwise.[15] In commenting upon matters "committed to the discretion of the trial court" (A 379), Judge Sweet drew a clear distinction between the scope of cross-examination (as to which he acknowledged he had discretion) and documentary evidence (which he wrongly viewed as strictly barred under Rule 608(b)). (E.g., A 239, 240-41, 248-49, 335). Had Judge Sweet understood that he had the power to do so, he surely would have admitted the checks, as he agreed with other defense that the matters to which the checks pertained were appropriate areas for cross-examination. (A 248-49, 296, 335; see A 280-81, 354-55,

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[15] Indeed, one member of the panel noted at oral argument that "Judge Sweet obviously didn't engage in any (Rule) 403 analysis" on this issue.

365-66).[16] Thus, the panel erred in upholding Judge Sweet's exclusionary ruling as an exercise of discretion that he mistakenly believed he did not possess, and in failing to address, and reject, the government's misguided and erroneous strict construction of Rule 608(b).

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[16] At oral argument on this appeal, the prosecutor remarked: "Our objection was specifically under (Rule] 608(b), which says you can't introduce extrinsic evidence; he can testify about it and they could cross-examine him all they want about it, but they can't introduce extrinsic evidence." He then acknowledged that "perhaps we relied on too strict a reading of 608(b)" and that "with hindsight . . . I'm not sure we should have taken that position . . . ."

POINT FOUR

THE PANEL IGNORED THE CUMULATIVE IMPACT OF FOUR SETS OF EQUIVOCAL UNCHARGED ACTS

Concerned that its case was "not going as well as we anticipated" (A 432), the government introduced proof of four purportedly similar acts, intended to "demonstrate (the defendants'] attitude toward the payment of taxes." (A 612; see A 678). The inadequacy of analysis preceding the offer and admission of this proof is amply demonstrated by the fact that in its brief on this appeal (at page 63 n.*), the government conceded that the introduction of one set of uncharged acts may have been erroneous as to co-defendant Messinger. Notably, the panel's opinion ignores this line of proof entirely, addressing only three

of the government's four similar acts. See Oshatz, slip op. at 6165-66.[17]

In sustaining the admission of the similar act proof, the panel viewed in isolation each of the three remaining uncharged acts and in each instance strained to draw an inference of guilty knowledge. Even assuming arguendo that any of the similar acts would have been admissible standing alone -- a proposition with which we do not agree -- the panel nevertheless missed the mark in failing to address, under Fed. R. Evid. 403, the cumulative impact of four

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[17] The panel overlooked the proof relating to trades handled by broker David Lamb for a partnership called ETKO. As we showed in our briefs, the government's theory as to the fraudulent nature of these trades, and appellant's knowledge of any fraud, was tenuous at best. See, e.g., Reply Brief of Michael Oshatz, at p.13.

separate sets of equivocal uncharged acts. At some point, the piling on of similar act proof becomes so unfair and so confusing to the jury that its exclusion is mandated under Rule 403. The similar act proof far exceeded that point in the present case.

CONCLUSION

For the foregoing reasons, the petition for rehearing and suggestion for rehearing en banc should be granted.

Respectfully submitted,

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Appendix E

UNITED STATES of America,

v.

Michael P. OSHATZ and Leonard A. MESSINGER, Defendants.

No. 87 Cr. 1000 (RWS).

United States District Court, S.D. New York.

Jan. 26, 1989.

OPINION

SWEET, District Judge.

[1] At issue is the propriety under Fed. R. Evid. 405(a) of a question posed during the cross-examination of a fact witness who had testified as to defendant's honesty. The question asked the witness to assume certain facts in contention and to

indicate whether such facts would alter her opinion.

Defendants Michael P. Oshatz ("Oshatz") and Leonard A. Messinger ("Messinger"), both lawyers in the same firm, have been charged with tax fraud for allegedly generating false tax losses through various partnerships that traded fraudulently in government securities and commodities. The trial began on November 22, 1988 and is ongoing.

In the course of cross-examining Gail Logan ("Logan"), a secretary with the defendants' law firm, defense counsel adopted Logan as a defense witness and elicited her opinion that Oshatz was truthful and honest. On redirect--effectively, cross-examination--the government asked Logan whether her opinion would change if the government showed

that Oshatz knew "that the... transactions were backdated" and "that the losses were phony," and that "Oshatz was simply giving losses away the way people wold give loaves of bread away." Defense counsel objected to the Government's questions, but the objection was overruled. The witness stated her opinion would change if the showing were made.

The government's case is drawing to a close, and the defense has moved for reconsideration of the ruling in light of the anticipated testimony of certain of its witnesses.

Rule 405(a) provides as follows:

(a) **Reputation or opinion.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of misconduct.

The question presented is whether the "specific instances of misconduct" about which the government properly may cross examine a character witness include the unlawful conduct at issue in the trial.

Prior Decisions

The courts that have addressed this question have reached conflicting results. *Compare Untied States v. Morgan*, 554 F.2d 31(2d Cir.) (permitting cross-examination of expert character witness regarding bad acts at issue in trial, but noting in dicta that such questions would be improper if asked of nonexpert character witnesses), *cert. denied*, 434 U.S. 965, 98 S. Ct. 504, 54 L. Ed. 2d 450 (1977); *Lopez v. Smith*, 515 F.Supp. 753, 756 (S.D.N.Y. 1981)(Weinfeld, J.) (permitting cross-examination of character witness regarding bad acts at issue in trial) (citing

United States v. Morgan, 554 F.2d at 33; *United States v. Senak*, 527 F.2d 129, 145-46 (7th Cir. 1975) (permitting, in the particular context of the facts presented, a question regarding charges at issue in the case), *cert. denied*, 425 U.S. 907, 96 S.Ct. 1500, 47 L.ED.2d 758 (1976), *with United States v. Page*, 808 F.2d 723 (10th Cir.) (disapproving of question regarding bad acts at issue in trial, but upholding conviction), *cert. denied*, 482 U.S. 918, 107 S.Ct. 3195, 96 L.Ed.2d 683 (1987); *United States v. McGuire*, 744 F.2d 1197 (6th Cir. 1984) (disapproving of question regarding bad acts at issue in trial) (dicta), *cert. denied*, 471 U.S. 1004, 105 S.Ct. 1866, 85 L.Ed.2d 159 (1985); *United States v. Williams*, 738 F.2d 172 (7th Cir.) (disapproving of question regarding bad acts at issue in trial, but

upholding conviction); *United States v. James*, 728 F.2d 465 (10th Cir. 1984) (disapproving of question regarding bad acts at issue in trial, but upholding conviction), cert, denied, 469 U.S. 826, 105 S. Ct. 106, 83 L.Ed.2d 50 (1984); *United States v. Primrose*, 718 F.2d 1484 (10th Cir. 1983) (disapproving of question regarding bad acts at issue in trial, but upholding conviction), *cert. denied*, 466 U.S. 974, 104 S. Ct. 2352, 80 L.Ed.2d 825 (1984); *United States v. Polsinelli*, 649 F. 2d 793 (10th Cir. 1981) (overturning conviction because government questioned defendant's character witness about bad acts at issue in trial); *United States v. Palmere*, 578 F.2d 105 (5th Cir. 1978), *cert. denied*, 439 U.S. 1118, 99 S. Ct. 1026, 59 L.Ed.2d 77 (1978); *United States v. Candelaria-Gonzalez*, 547 F.2d 291 (5th Cir.

1977) (overturning conviction because government repeatedly questioned defendant's character witnesses about bad acts at issue in trial).

The Second Circuit has confronted this issue in *United States v. Morgan*, 554 F.2d 31 (2d Cir.), *cert. denied*, 434 U.S. 965, 98 S.Ct. 504, 54 L.Ed.2d 450 (1977), in which a brokerage firm's managing partner was charged with securities fraud arising out of selling unregistered stock in a company in receivership. The defendant called a character witness who stated his favorable opinion regarding the defendant's honesty, integrity, and truthfulness. On cross-examination, the government asked the witness if his opinion would change if the defendant knew the company was in receivership, but failed to disclose that fact to his

customers. The defendant was convicted, and on appeal he challenged the government's right to ask the character witness such a hypothetical question.

> The court upheld the conviction, noting: Here, the matter being pursued was the opinion of the witness concerning the defendant's character. When a witness is permitted to state his own opinion on a matter in issue, as he is now under Rule 405 of the Federal Rules of Evidence, some latitude in cross-examination must be allowed. Opinion testimony of expert witnesses has traditionally been given in response to hypothetical questions based upon the evidence in the case, ... and this form of questioning may properly be used on cross-examination as well as direct.

Id. at 33 (citations omitted). In dicta, however, the Court added:

> It does not follow from this holding that we approve of the question which was asked. Because it is too early in the history of Rule 405 to predict how much use ingenious counsel will make of opinion testimony from witnesses

> who may qualify as experts on traits of character, we are reluctant to prescribe an evidentiary rule which will inhibit full cross-examination of any such expert. Insofar as non-expert character witnesses are concerned, however, we believe that the probative value of a hypothetical question such as the one at issue herein is negligible and that it should not be asked. The jury is in as good a position as the non-expert witness to draw proper inferences concerning the defendant's character from its own resolution of the issues.

The disallowance of the cross-examination of character witnesses regarding the crime for which the defendant is on trial has been based on concern that such questions destroy the presumption of innocence by requiring the witness to assume that the defendant committed the acts at issue in the trial. *See, e.g., United States v. Candelaria-Gonzalez*, 547 F.2d 291 (5th Cir. 1977) ("The agent's testimony was raised to the status of

accepted fact, and the presumption of innocence was destroyed in the process.") *United States v. Polsinelli*, 649 F.2d 793 (10th Cir. 1981) (the questions "were so framed as to assume that [the defendant] was, in fact, guilty of the offenses for which he was then on trial").

[2] However, Rule 405(a) permits cross-examination of character witnesses regarding specific instances of misconduct by the defendant for the purpose of evaluating the character witness's credibility, not for proving the defendant's guilt. *See, United States v. Birney*, 686 F.2d 102, 108 (2d Cir. 1982); *United States v. Bermudez*, 526 F.2d 89, 95 (2d Cir. 1975), *cert. denied*, 425 U.S. 970, 96 S.Ct. 2166, 48 L.Ed.2d 793 (1976); 2 J. Weinstein and M. Berger, *Weinstein's Evidence* ¶ 405[04], at 405-47 (1986). By

interrogating a character witness about specific instances of the defendant's misconduct, a questioner can test the witness's knowledge of the defendant and standards for a good reputation or a favorable opinion. *See id.* ¶ 405[02], at 405-23.

[3] The question's only purpose is to help the jury determine how much weight to accord the witnesses testimony, and the court should instruct the jury accordingly. *See, e.g., United States v. Birney*, 686 F.2d 102, 108 (2d Cir. 1982); *see also* 2 J. Weinstein and M. Berger, *Weinstein's Evidence* ¶ 405[02], at 405-23 n. 22 (1986). Moreover, by questioning the character witness about the events at issue in the trial, the government presents nothing new to the jury--and the jury remains free to draw its own conclusions from the evidence. *See, United States*

v. Morgan, 554 F.2d 31, 33 (2d Cir.) (noting that a question based on testimony already offered "introduced nothing into the case which was not already before the jury"), *cert. denied*, 434 U.S. 965, 98 S.Ct. 504, 54 L.Ed.2d 450 (1977). Under these circumstances, the cross-examination does not impair the presumption of innocence.

The Second Circuit in *Morgan*, *supra*, dealt with cross-examination regarding matters at issue in the trial with respect to expert character witnesses. Its distinction between expert and nonexpert character witnesses--which appears nowhere in the test of Rule 405(a)--reflects a belief that cross-examination concerning the conduct for which the defendant is on trial involves "hypothetical" questions.

However, the fact that a defendant has yet to be convicted for an unlawful act does not make a question regarding that act "hypothetical." The government can question a character witness about a specific instance of misconduct, provided it believes in good faith that the alleged bad act has a basis in fact and the question is relevant to the character traits at issue. *See, Michelson v. United States*, 335 U.S. 469, 481 n. 18, 69 S.Ct. 213, 221 n. 18, 93 L.Ed. 168 (1948); *United States v. Giddins*, 273 F.2d 843, 845 (2d Cir.), *cert. denied*, 362 U.S. 971, 80 S. Ct. 955, 4 L.Ed.2d 900 (1960); *United States v. Nixon*, 777 F.2d 958, 970 (5th Cir. 1985). "That does not mean that the basis in fact must be proved as a fact before a good faith inquiry can be made." *Nixon*, 777 F.2d at 970.

[4, 5] For example, the government can question a character witness about the defendant's misconduct, even if that misconduct never results in arrest. *See, e.g., United States v. Birney*, 686 F.2d 102, 108 (2d Cir. 1982) (permitting questions regarding defendant's loan applications in which she failed to disclose certain liabilities); *United States v. Bynum*, 566 F.2d 914, 919 (5th Cir.) (permitting questions regarding defendant's alleged theft of an airplane and his alleged planned theft of a trailerload of hams), *cert. denied*, 439 U.S. 840, 99 S. Ct. 130, 58 L.Ed.2d 138 (1978). Similarly, the government can ask a character witness about an arrest, even if there was no conviction or the conviction later was overturned on appeal. *See, e.g., United States v. Bermudez*, 526 F.2d 89, 95 (2d Cir. 1975)

(permitting question regarding defendant's 1974 arrest on a marijuana charge), *cert. denied*, 425 U.S. 970, 96 S.Ct. 2166, 48 L.Ed.2d 793 (1976); *United States v. Evans*, 542 F.2d 805, 817 (10th Cir. 1976) (permitting question regarding prior arrest and noting that the disposition of those arrests was irrelevant to the examination of a character witness), *cert. denied*, 429 U.S. 1101, 97 S.Ct. 1124, 51 L.Ed.2d 550 (1977); *United States v. Dawson*, 556 F.Supp. 418, 425 (E.D.Pa. 1982) (permitting question regarding a murder conviction that had been reversed on appeal), *affirmed sub nom.* 727 F.2d 1099 (3d Cir. 1984). These instances of misconduct which never resulted in a conviction are not "hypothetical," and the defendant's current trial does not render a question about the misconduct at issue "hypothetical."

The Question is Appropriate

Rule 405(a) authorizes cross-examination regarding specific instances of misconduct by the defendant to help the jury assess the character witness's credibility and determine the weight to give the witness's testimony. For this purpose, there is no reason to distinguish between wrongdoing that never resulted in arrest or conviction and wrongdoing that currently is at issue in the trial. Both types of questions enable the jury to appraise the character witness's knowledge of the defendant and his or her standards for a good reputation or favorable opinion and both should be allowed.

Indeed, questioning a character witness about the misconduct at issue in the trial may be preferable. When the government's cross-examination introduces facts

relating to other instances of misconduct by the defendant, there is a risk that the jury will infer from those facts a propensity to commit the crime at issue in the trial. Questions about facts already before the jury present no such risk.

Conclusion

For the reasons set forth above, the government's cross examination of Logan was proper, and the government may question the defendants' other character witnesses regarding the misconduct at issue in the trial, provided the government believes in good faith that the misconduct has a basis in fact and the questions are relevant to the character traits at issue.

It is so ordered.

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